Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statutory enforcement scheme for assessing forfeitures for allegedly indecent broadcasting, on its face and as administered by the Federal Communications Commission, violates the First and Fifth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners in this case, plaintiffs and appellants below, are Action for Children's Television; American Civil Liberties Union; Association of Independent Television Stations, Inc.; Fox Broadcasting Company, Inc.; Fox Television Stations, Inc.; Greater Media, Inc.; Infinity Broadcasting Corporation; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Association of College Broadcasters; National Public Radio, Inc.; People for the American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; Shamrock Broadcasting, Inc.; Society of Professional Journalists; South Fork Broadcasting Corporation; and 20th Century Fox Film Corporation. Respondent in this case, defendant and appellee below, is the Federal Communications Commission.

Petitioners Fox Broadcasting Company, Inc., Fox Television Stations, Inc., and 20th Century Fox Film Corporation are wholly owned subsidiaries of News America Holdings, Inc. and The News Corporation, Ltd. Petitioner Post-Newsweek Stations, Inc. is a wholly owned subsidiary of The Washington Post Company. Petitioner Shamrock Broadcasting, Inc. is a wholly owned subsidiary of Trefoil Communications, Inc. No other petitioner is a corporation with a parent or partly owned subsidiary.

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ACTION FOR CHILDREN'S TELEVISION, *et al.*,
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v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Action for Children's Television and others respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 59 F.3d 1249 and is reprinted beginning at page 1a of the appendix to this petition. The opinion of the United States District Court for the District of Columbia is reported at 827 F. Supp. 4 and is reprinted beginning at page 31a of the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions at issue are U.S. Const. Amends. I and V. The statutory provisions at issue are 47 U.S.C. §§ 503(b) and 504(a). These provisions are reprinted beginning at page 63a of the appendix to this petition.

STATEMENT OF THE CASE

This case presents First and Fifth Amendment challenges to the enforcement scheme used by respondent Federal Communications Commission (FCC) to impose forfeitures for allegedly indecent broadcasting. The statutory procedures fail to ensure prompt administrative adjudication or judicial review of individual indecency forfeiture orders — a process that consumes, according to the stipulated record in this case, between two and seven years. In the meantime, the FCC requires broadcasters to comply with the indecency standards set forth in those orders, and it threatens broadcasters who fail to do so with a wide range of sanctions, including substantially increased fines and the loss of a broadcasting license. As a result, broadcasters must conform their speech to judicially unreviewed indecency restrictions, notwithstanding the availability of substantial constitutional and other defenses to those restrictions.

The court of appeals repeatedly characterized this scheme as constitutionally "troubling" (Pet. App. 2a, 16a), noting both "the delay inherent in the current scheme" (Pet. App. 20a) and the "exacerbat[ing]" effects of the FCC's aggressive interim enforcement (Pet. App. 6a). Nonetheless, despite a strong dissent and a concurrence "with reservations" (Pet. App. 22a), a 2-1 majority held that the indecency forfeiture scheme was constitutional.

Petitioners in this case include various broadcasters, program distributors, and organizations representing the interests of listeners and viewers. Petitioners contend here, as they did below, that the indecency forfeiture scheme operates as a system of "informal censorship" within the meaning of *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67, 69 n.9, 71 (1963), and that it

is unconstitutional for failure to ensure adequate procedural safeguards, including "almost immediate" judicial review of the FCC indecency determinations (*id.* at 70).

1. Statutory Procedures

Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), authorizes the FCC to impose monetary forfeiture penalties for various statutory violations, including the broadcast of material that is "indecent" within the meaning of 18 U.S.C. § 1464.[1] This case involves only the adjudication of indecency forfeitures under the informal procedures set forth in § 503(b)(4).[2]

To assess a forfeiture under § 503(b)(4), the FCC must first provide the broadcaster with a written "notice of apparent liability" (NAL). 47 U.S.C. § 503(b)(4)(A). The NAL must identify the nature of the alleged violation, the date of the alleged violation, and the amount of the proposed forfeiture. *Id.* § 503(b)(4). The broadcaster receives no evidentiary hearing, but can attempt to show "in writing" why "no . . . forfeiture penalty should be imposed." *Id.* § 503(b)(4)(C). As a practical matter, the issuance of an NAL ensures an ultimate forfeiture decision, for "the FCC has never failed to impose a forfeiture after issuing a[n] NAL." Pet. App. 4a.

When the FCC imposes a final indecency forfeiture under § 503(b)(4), the broadcaster cannot seek judicial review. Under 47 U.S.C. § 504(a), a broadcaster obtains review by refusing to pay the forfeiture and then defending an action for collection,

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[1] Section 1464 makes it unlawful to "utte[r] any obscene, indecent, or profane language by means of radio communication."

[2] The FCC may adjudicate indecency and other forfeitures under the formal procedures set forth in § 503(b)(3). Because the FCC "does not use the procedures of § 503(b)(3)," the court of appeals expressed no view on whether its procedures are constitutional. Pet. App. 3a. This case does not involve those formal procedures. Nor does it involve the § 503(b)(4) procedures in contexts other than broadcast indecency.

filed by the Department of Justice (DOJ) against the broadcaster in a United States District Court. A collection action is the "exclusive means for review of a forfeiture order" under § 503(b)(4). *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496, 501-02 (D.C. Cir. 1977); *see also Dougan v. FCC*, 21 F.3d 1488, 1490-91 (9th Cir. 1994).

No statute requires prompt administrative adjudication or judicial review of indecency forfeiture determinations. With respect to administrative adjudication, the FCC takes between six and 35 months to issue an NAL (14 months on average); and takes an additional six to 23 months to impose a final forfeiture after an NAL has issued (11 months on average). Pet. App. 36a.[3] With respect to judicial review, a collection action need only be filed within five years of the allegedly indecent broadcast. 28 U.S.C. § 2462. Once an action has been timely filed, "no statute requires the District Court to decide the action within a specified period of time, and there is no requirement of expedition." Pet. App. 37a. Because of these various delays, "the earliest a broadcaster could hope to be brought into court is some two years after the offending broadcast"; and in "extreme" cases, "a broadcaster could wait as long as six or seven years from the time a program was aired until its first opportunity for judicial review of the Commission's decision that the material was indecent." Pet. App. 5a-6a.

As a practical matter, broadcasters cannot endure these delays. Although the FCC instituted at least three dozen indecency forfeiture proceedings between 1987 and March 24, 1993, *see* Stipulations of Fact, Ex. 3, *Action for Children's Television v. FCC*, No. 93-0400 (D.D.C. Mar. 24, 1993) ("Stipulations"), only three broadcasters have "held out long enough" for the FCC to refer their cases to DOJ for enforcement. Pet. App. 5a. When

[3] The only statutory requirement is that the FCC must issue an NAL within one year of the allegedly indecent broadcast or within the term (five years for television and seven years for radio) of the broadcast license in effect when the broadcast occurred. 47 U.S.C. § 503(b)(6).

the stipulated record in this case was assembled, only one collection action had ever been filed — exactly two days before the five-year limitations period would have run. *Id.* That case was settled, before a final review of the underlying indecency determination, more than eighteen months later. *United States v. Evergreen Media Corp.*, Civ. No. 92-C-5600, Agreement for Settlement and Dismissal With Prejudice (N.D. Ill. Feb. 22, 1994).

2. Interim FCC Enforcement Activities

Despite these delays, the FCC "frequently uses forfeiture orders to announce new indecency standards" that it "expects all broadcasters to follow" immediately, and it "threatens them with sanctions should they refuse to comply." Pet. App. 38a. Thus, in issuing NALs, the FCC often cites alleged similarities between the program at issue and programs found indecent in prior unreviewed forfeiture orders and NALs. *See, e.g., Notice of Apparent Liability to WCKS Broadcasters, Ltd.*, 9 FCC Rcd. 4871, 4872 (1994) (NAL for program "similar in nature" to program previously found indecent); *Notice of Apparent Liability to the Rusk Corp.*, 8 FCC Rcd. 3228, 3228 (1993) (NAL for broadcast "comparable to broadcasts that the Commission has determined to be indecent"); *see also Notice of Apparent Liability to KGB, Inc.*, 7 FCC Rcd. 3207, 3207 (1992) (NAL for "egregious" violation "given the prior Commission determination that that particular material was indecent"). Moreover, in determining an appropriate penalty, the FCC takes into account violations alleged against the same broadcaster in past orders that remain "contested and judicially unreviewed." Stipulations, *supra*, at 16-17.

In various public statements, individual FCC commissioners have demanded that broadcasters immediately follow indecency standards set forth in FCC forfeiture orders and NALs. In light of those orders, for example, Chairman Sikes urged broadcasters to "temper their offerings" (*id.*, Ex. 2, at 5); Commissioner Duggan urged broadcasters to "exercise greater self-restraint" (*id.*, Ex. 2, at 2); and Commissioner Marshall urged broadcasters

"to learn from the actions that are out there" (*id.*, Ex. 2.8). Commissioner Quello, moreover, repeatedly has threatened that the FCC will revoke the license of any broadcaster who continues to air material that the FCC has held to be indecent. *Id.*, Ex. 2, at 2-4; Ex. 2.1, at 2-4; Ex. 2.3, at 4-6. *See generally id.*, Ex. 2.

The FCC has applied this scheme to petitioner Infinity Broadcasting Corporation with particular vigor. On December 16, 1988, Infinity broadcast a single allegedly indecent program. The FCC took over 23 months to issue an NAL (for the then-typical sum of $6000), an additional 23 months to issue a forfeiture order, and an additional 11 months to reject promptly filed petitions for reconsideration.[4] Although the forfeiture remained contested and unreviewed into 1995, the FCC nonetheless issued four subsequent NALs between 1992 and 1994, for an unprecedented total of $1.7 million, to punish Infinity for an alleged "pattern" or "history" of indecency violations tracing back to the 1988 broadcast.[5] One of those NALs noted that these penalties would have been even greater but for "review mechanisms" (i.e., self-censorship) that "appear[ed] to be responsive in bringing about compliance with [FCC] indecency

[4] *See Notice of Apparent Liability to Sagittarius Broadcasting Corp.*, 5 FCC Rcd. 7291 (Dec. 7, 1990); *In the Matter of Liability of Sagittarius Broadcasting Corp.*, 7 FCC Rcd. 6873 (Oct. 23, 1992) (imposing forfeiture), *aff'd*, 8 FCC Rcd. 3600 (1993); *In the Matter of Sagittarius Broadcasting Corp.*, 8 FCC Rcd. 3600 (May 20, 1993) (denying reconsideration), *aff'd*, 8 FCC Rcd. 7975 (1993); *In the Matter of Sagittarius Broadcasting Corp.*, 8 FCC Rcd. 7975 (Nov. 10, 1993) (same).

[5] *See Notice of Apparent Liability to Sagittarius Broadcasting Corp.*, 8 FCC Rcd. 2688, 2689-90 & n.2 (1992) ($600,000); *Notice of Apparent Liability to Infinity Broadcasting Corp.*, 8 FCC Rcd. 6740, 6741 (1993) ($500,000); *Notice of Apparent Liability to Sagittarius Broadcasting Corp.*, 9 FCC Rcd. 1746, 1747 (1994) ($400,000); *Notice of Apparent Liability to Infinity Broadcasting Corp.*, 9 FCC Rcd. 6442, 6443 (1994) ($200,000).

restrictions."[6] Two of the NALs explicitly threatened revocation of broadcast licenses as punishment for any future infractions.[7] Under these circumstances, and faced with the need to deal regularly with the FCC in numerous contexts, Infinity settled all five cases on September 1, 1995, promising to "establish a program designed to educate and update on-air personnel regarding FCC indecency actions."[8] As of the settlement date, not one of the five FCC indecency determinations had been judicially reviewed.

3. Constitutional Defenses

In restricting indecent broadcasting, the FCC must act within narrow constitutional limits. In *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), this Court held that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Accordingly, the FCC may restrict indecent broadcasting only "to promote a compelling interest," and only if it "chooses the least restrictive means to further that articulated interest." *Id.* Broadcasters thus retain substantial First Amendment defenses to individual indecency forfeiture determinations.

[6] *See Infinity*, 8 FCC Rcd. at 6741.

[7] *See Sagittarius*, 8 FCC Rcd. at 2690 ("any future failure on the part of Infinity or its subsidiaries to comply in good faith with the prohibitions of indecent broadcasting outside the safe harbor hours, will result in further appropriate enforcement action, which may include further forfeiture proceedings, short-term renewal or the issuance of an order to show cause to revoke some or all of Infinity's broadcast licenses"); *Infinity*, 8 FCC Rcd. at 6741 ("We remind Infinity that its credibility concerning its intent to comply with the statutory and regulatory limitations on indecent broadcasts is severely strained. Any future infractions in this area would place Infinity's continuing fitness as a Commission licensee in question.").

[8] *See In the Matter of Sagittarius Broadcasting Corp.*, No. FCC 95-386, 1995 FCC Lexis 5924, at *11 (Sept. 5, 1995) (reprinting settlement).

Most obviously, broadcasters may contend that the specific program at issue cannot constitutionally be regulated as indecent. That argument is often credible, because "context is all-important" in making indecency determinations. *See FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978); *see also In the Matter of Liability of Sagittarius Broadcasting Corp.*, 7 FCC Rcd. 6873, 6874 (1992) ("indecency determinations are highly fact-specific and are necessarily made on a case-by-case basis"), *aff'd*, 8 FCC Rcd. 3600 (1993). Moreover, the FCC's generic definition of broadcast indecency — programs that contain "language that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs" (Public Notice, 2 FCC Rcd. 2726, 2726 (1987)) — does not simplify the inquiry. As Justice (then Judge) Ginsburg has explained, the FCC's generic definition is "less than precise," and "vagueness is inherent in it." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1342, 1344 (D.C. Cir. 1988) ("*ACT I*").[9]

Despite these various credible challenges, the FCC so far has escaped all judicial review of indecency restrictions announced in its forfeiture orders and NALs. Judicial review has been available only where the FCC has imposed indecency restrictions

[9] A pending petition for certiorari in *Action for Children's Television v. FCC*, No. 95-520 ("*ACT III*"), raises a vagueness challenge to the FCC's generic definition of broadcast indecency. The *ACT III* petition also presents the question of the scope of the constitutionally required "safe harbor" for broadcast indecency. Twice within the past eight years, the D.C. Circuit has invalidated statutes, FCC regulations, or FCC orders purporting to narrow the "safe harbor." *See Action for Children's Television v. FCC*, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991) ("*ACT II*"), *cert. denied*, 112 S. Ct. 1282 (1992); *ACT I*, 852 F.2d at 1340-44. Most recently, that court upheld a safe harbor limited to between 10:00 p.m. and 6:00 a.m. *See ACT III*, 58 F.3d 654, 659-67 (D.C. Cir. 1995) (en banc), *cert. pending* (No. 95-520). Broadcasters also may raise safe harbor defenses in the context of individual forfeiture proceedings.

by regulation, as in *Action for Children's Television v. FCC*, 58 F.3d 654, 658-59 (D.C. Cir. 1995) (en banc) ("*ACT III*"), *cert. pending* (No. 95-520), and *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507 (D.C. Cir. 1991), ("*ACT II*"), *cert. denied*, 112 S. Ct. 1282 (1992); or where the FCC has rendered an adjudicatory determination of indecency, but has *declined* to assess a forfeiture penalty, as in *Pacifica* (438 U.S. at 730) and *ACT I* (852 F.2d at 1336). However, although the FCC issued at least three dozen forfeiture orders or NALs between 1987 and March 24, 1993 (*see* Stipulations, *supra*, Ex. 3), and has since issued at least eleven more,[10] *not a single one* of the indecency determinations within those orders has been judicially reviewed.

4. The Litigation Below

Petitioners filed suit in district court to challenge the constitutionality of this enforcement scheme, invoking federal question jurisdiction under 28 U.S.C. § 1331. On a stipulated record, the court granted summary judgment to the FCC.

The district court acknowledged "some similarities" between the indecency forfeiture scheme and the scheme of "informal censorship" that *Bantam Books* had invalidated for lack of "procedural safeguards." Pet. App. 55a. The court also acknowledged *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 403 (D.C. Cir. 1974), in which the D.C. Circuit had noted that the indecency forfeiture scheme "seems very like that condemned by the Supreme Court in *Bantam*

[10] *See, e.g.*, *Notice of Apparent Liability to Rich Communications Corp.*, 10 FCC Rcd. 5149 (1995); *WCKS Broadcasters*, 9 FCC Rcd. 4871; *Notice of Apparent Liability to Southern Nevada Radio, Inc.*, 9 FCC Rcd. 4454 (1994); *Infinity*, 9 FCC Rcd. 6442; *Notice of Apparent Liability to Agape Broadcasting Corp.*, 9 FCC Rcd. 1679 (1994); *Notice of Apparent Liability to Flambo Broadcasting, Inc.*, 9 FCC Rcd. 1681 (1994); *Sagittarius*, 9 FCC Rcd. 1746; *Notice of Apparent Liability to Americom Las Vegas*, 9 FCC Rcd. 1753 (1994); *Infinity*, 8 FCC Rcd. 6740; *Notice of Apparent Liability to Americom Las Vegas*, 8 FCC Rcd. 6790 (1993); *Rusk Corp.*, 8 FCC Rcd. 3228.

Books." Pet. App. 59a n.14. But the court dismissed that statement as "dicta" (*id.*), and it asserted that the *Bantam Books* scheme was distinguishable from the indecency forfeiture scheme because it did not involve broadcasting; made no provision for notice, reasoned decisionmaking, or judicial review; and was not limited to certain times of day. Pet. App. 55a-59a.[11]

A divided court of appeals affirmed. In so doing, however, the majority repeatedly acknowledged that the "delay inherent in the current scheme" (Pet. App. 20a), the "increased forfeiture[s]" based on contested and unreviewed orders (Pet. App. 6a), and the "active public role" of FCC commissioners in threatening broadcasters with sanctions (*id.*) make the indecency forfeiture scheme constitutionally "troubling." Pet. App. 2a, 16a. The majority expressly reserved judgment on whether the district court had adequately distinguished the indecency forfeiture scheme from the scheme of "informal censorship" at issue in *Bantam Books*. Pet. App. 20a-21a. The majority also did not endorse the principal argument asserted by the FCC on appeal — that procedural safeguards are unnecessary where the censorship scheme imposes no legal compulsion, as opposed to practical compulsion, until after judicial review has been completed. *See* Brief for Appellee at 26-40, *Action for Children's Television v. FCC*, No. 93-5178 (D.C. Cir. June 18, 1994).[12]

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[11] The district court dismissed a statutory claim that is not at issue here. Pet. App. 42a-43a. The court also, in petitioners' view improperly, dismissed most petitioners on assorted grounds of standing, ripeness and comity. Pet. App. 45a-52a. The court of appeals did not address these dismissals, because it concluded that petitioner Infinity satisfied all applicable justiciability requirements (Pet. App. 45a-52a). *See, e.g.*, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977); *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

[12] In fact, the scheme of "informal censorship" at issue in *Bantam Books* imposed no legal compulsion until after judicial review was complete. *See* 372 U.S. at 66-67.

Nonetheless, endorsing theories raised neither below nor on appeal, the majority concluded that the indecency forfeiture scheme was constitutional. The majority rejected a "facial" challenge because although the statutory procedures concededly fail to ensure prompt adjudication and review, "nothing in the statutes or regulations *prevents* the Commission" or the DOJ from proceeding "within a period of time short enough virtually to eliminate any concern with delay." Pet. App. 15a-16a (emphasis added).[13] Addressing the *Bantam Books* claim as an "as applied" challenge (Pet. App. 16a), the majority held that the procedures at issue are constitutional unless they restrain specific programs that are, as a substantive matter, not indecent. *E.g.*, Pet. App. 20a ("[T]he delay inherent in the current scheme . . . is of constitutional significance only if it burdens speech that is not indecent.").[14] The majority also stated that the FCC has not done anything "actively to discourage judicial review" and that there is "no indication" that the FCC "will fail to follow judicial guidelines for determining what is indecent and what is not." Pet. App. 19a.

Chief Judge Edwards joined the majority but noted his concurrence "with reservations." Pet. App. 22a. He too found "serious problems with the current practice followed by the FCC in administering sections 503(b) and 504(a)." Pet. App. 24a. While he asserted that the law of broadcast indecency "is in a state of disarray," he nonetheless concluded that the broadcasters here "cannot prevail" absent a showing "that speech that is not indecent is in fact being chilled." *Id.*

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[13] The Court cited "90 days" as an example of an assertedly constitutional time frame. Pet. App. 15a-16.

[14] *See also* Pet. App. 18a-19a ("the FCC is not enforcing the statutory ban on indecency against material that is not indecent"); Pet. App. 21a ("There is no indication in the case law that such a scheme is unconstitutional absent some showing that the agency is forcing off the air material that is not indecent.").

Judge Tatel dissented. He stressed that the indecency forfeiture scheme "is characterized by years of delay and a total lack of judicial review." Pet. App. 24a-25a. He found *Bantam Books* squarely controlling:

> As the Supreme Court recognized in *Bantam Books*, "people do not lightly disregard public officers' thinly veiled threats to institute . . . proceedings if they do not come around." According to the record in this case, that is exactly what broadcasters are doing: they "come around" in the face of economic and regulatory coercion, not necessarily because their broadcasts are indecent, but because they cannot get judicial review of the Commission's indecency determinations. This manipulation of speech without judicial review is unconstitutional.

Pet. App. 29a-30a, quoting 372 U.S. at 68.[15]

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the decision below holding that the FCC's indecency forfeiture scheme is constitutional. The decision below conflicts with *Bantam Books* and its progeny in several important respects, and is directly at odds with fundamental doctrines requiring prompt judicial review of restrictions on protected speech. The notion that delayed review is permissible where statutes do not "preven[t]" prompt review and where the censor has not "actively" discouraged review finds no support whatsoever in this Court's decisions. The First Amendment issues here are urgent, in view of the nationwide censorship exercised by the FCC across an entire medium of communication. If not corrected, the decision below

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[15] In fact, petitioners gave stipulated testimony that they "attempt to conform their conduct to the indecency standards articulated by the FCC and its Commissioners, *whether or not they believe those standards are constitutional*, especially because of the various sanctions to which broadcasters are potentially subject." Stipulations, *supra*, at 17-18 (emphasis added).

will substantially undercut important procedural protections essential to thousands of broadcasters making daily programming decisions about a wide range of protected speech.

I. THE DECISION BELOW CONFLICTS WITH *BANTAM BOOKS* AND ITS PROGENY

In its seminal decision in *Bantam Books*, this Court established two propositions that are critical and dispositive here: (1) that informal administrative determinations of indecency or obscenity, coupled with threats against speakers who fail to heed those determinations immediately, can constitute a system of "informal censorship" subject to rigorous First Amendment scrutiny (372 U.S. at 66-68); and (2) that any such system is unconstitutional unless it affords "the most rigorous procedural safeguards" in general (*id.* at 66) and, in particular, unless it "operate[s] under judicial superintendence" and "assure[s] an almost immediate judicial determination" of whether the underlying administrative standards are constitutional (*id.* at 70).

The courts below did not, of course, hold that the indecency forfeiture scheme ensures "almost immediate" judicial review of the indecency standards articulated in FCC forfeiture orders and NALs. On the contrary, the court of appeals acknowledged that "[b]y all indications, a long wait promises to be the rule rather than the exception" (Pet. App. 6a), just as the district court had acknowledged that the forfeiture process is "greatly prolonged" and that "[t]here are few if any checks" on its duration (Pet. App 36a-37a). Indeed, it is undisputed that the "shortest" time for obtaining judicial review is "two years" and that in "extreme" cases, a broadcaster "could wait as long as six or seven years." Pet. App. 5a-6a. Neither the courts below nor the FCC could suggest that the Constitution permits delays of this magnitude. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975) (five-month delay is impermissible); *Freedman v. Maryland*, 380 U.S. 51, 55 (1965) (six-month delay is impermissible); *cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 438 & n.1 (1957) (three-day delay is permissible).

In holding that the indecency forfeiture scheme is nonetheless constitutional, the court of appeals misread *Bantam Books* and related decisions in several important respects. First, the court held that a scheme of "informal censorship" need not provide an affirmative statutory guarantee of prompt judicial review. Pet. App. 15a-16a. Second, the court held that a plaintiff challenging a scheme of "informal censorship" for lack of "procedural safeguards" must prove that the scheme "burdens speech that is not indecent." Pet. App. 20a. And third, the court suggested that the district court's analysis "might" adequately distinguish the indecency forfeiture scheme from a scheme of "informal censorship." Pet. App. 21a.

A. In Holding That An Affirmative Statutory Guarantee Of Prompt Judicial Review Is Unnecessary, The Decision Below Conflicts With *Bantam Books* And Other Decisions Of This Court

The court of appeals held that the indecency forfeiture scheme is not necessarily invalid, at least on its face, because "nothing in the statutes or regulations *prevents*" the FCC and the DOJ from acting promptly. Pet. App. 15a-16a (emphasis added). However, to protect against the "*[r]isk* of delay," this Court has held that any censorship scheme must afford prompt judicial review not only in actual practice, but must affirmatively guarantee such review on the face of a relevant "statutory provision." *Freedman*, 380 U.S. at 55 (emphasis added).

In various contexts, this Court has invalidated censorship schemes that do not "preven[t]" prompt judicial review (Pet. App. 15a-16a), but also do not affirmatively guarantee it. For example, although the censorship scheme in *Freedman* did not "preven[t]" authorities from promptly determining whether the movie at issue was obscene, the Court held it unconstitutional because "the . . . *statute* provides no *assurance* of prompt judicial determination." 380 U.S. at 60 (emphases added). Although the censorship scheme in *Blount v. Rizzi*, 400 U.S. 410, 417-18 (1971), did not "preven[t]" the postal service from promptly determining whether the piece of mail at issue was obscene, the

Court held it unconstitutional because "[t]he scheme has no *statutory* provision . . . *assuring* prompt judicial review" (emphasis added). And, although the censorship scheme in *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988), did not "preven[t]" authorities from promptly determining whether fundraisers had complied with applicable licensing requirements, the Court held it unconstitutional because "the Charitable Solicitations *Act* (as amended) *permits a delay* without limit" (emphases added). *See also Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 315-17 (1980) (per curiam); *Conrad*, 420 U.S. at 558-562. The decision below plainly conflicts with these decisions.

B. In Holding That Broadcasters Must Prove That The Specific Programs At Issue Are Not Indecent, The Decision Below Conflicts With *Bantam Books*, *Conrad* And Other Decisions Of This Court

The court of appeals also held that a plaintiff challenging a scheme of "informal censorship" under *Bantam Books*, at least as applied, must prove not only the lack of appropriate "procedural safeguards," but also that the scheme at issue "burdens speech that is not indecent." Pet. App. 15a. The court of appeals' decision in this regard also conflicts with decisions of this Court. *Bantam Books* itself imposes no such requirement, and its progeny confirm that no such requirement is appropriate.

The court of appeals rested its holding on a single sentence in a single footnote in *Bantam Books*' statement of facts. Pet. App. 18a-19a, citing 372 U.S. at 62 n.4. That sentence noted that the censor in *Bantam Books* had attempted to restrain "some" unspecified publications that were "not obscene as this Court has defined the term." But as Judge Tatel explained in dissent below (Pet. App. 25a-26a), this Court invalidated the scheme of "informal censorship" not because it restrained specific books that were in fact not obscene, but because its "*procedures*" were "radically deficient." 372 U.S. at 71 (emphasis added). Nothing in the Court's extended analysis of "procedural safeguards" (*id.* at 66) suggests that the result in *Bantam Books* turned on the

degree of substantive protection appropriate for the specific books at issue.

In *Conrad*, moreover, this Court later confirmed that no such substantive inquiry is appropriate. Citing ***Bantam Books***, the Court in *Conrad* invalidated a censorship scheme lacking the necessary "procedural safeguards." 420 U.S. at 559. In so doing, the Court explicitly refused to consider whether the musical "Hair," the only program at issue in that case, was substantively protected:

> We do not decide whether the performance of "Hair" fits within such an exception [to the First Amendment] or whether, as a substantive matter, the board's standard for resolving that question was correct, for we conclude that the standard, whatever it may have been, was not implemented by the board under a system with appropriate and necessary procedural safeguards.

Id. at 559. The Court then repeated itself for emphasis:

> We need not decide whether the standard of obscenity applied by respondents or the courts below was sufficiently precise or substantively correct, or whether the production is in fact obscene. The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances.

Id. at 562 (citations omitted). The court of appeals' holding squarely conflicts with *Conrad*.

Finally, the decision below is inconsistent with the numerous other decisions of this Court permitting a plaintiff challenging a censorship scheme on procedural grounds to argue that the scheme is "in its entirety unconstitutional[l]" (*Freedman*, 380 U.S. at 53), regardless of "whether or not his conduct could be proscribed by a properly drawn statute" (*id.* at 56). So, for example, *Vance* invalidated a procedurally improper "obscenity injunction" in all of its applications, without first determining

whether the specific movies at issue were in fact obscene. 445 U.S. at 315-17. Similarly, ***Blount*** invalidated in all of its applications a procedurally improper statute restricting "obscene" mailings, without first determining whether the single magazine at issue was in fact obscene. 400 U.S. at 412, 415 n.3. The decision below also conflicts with these cases.

C. The Conflict With *Bantam Books* Cannot Be Dismissed On The Ground That The Indecency Forfeiture Scheme Is Different From The Scheme Of "Informal Censorship" Invalidated In *Bantam Books*

The court of appeals also suggested that the "additional factors" cited by the district court "might" adequately distinguish the indecency forfeiture scheme from the scheme of "informal censorship" at issue in ***Bantam Books***. Pet. App. 20a-21a. But the stipulated record demonstrates that the FCC behaves exactly like the censor in ***Bantam Books***: it promulgates its own administrative determinations of indecency (372 U.S. at 61); it deliberately and immediately seeks "to achieve the suppression" of programs that conflict with those standards (at least during most of the broadcast day) (*id.* at 67); it employs a wide range of tactics, including "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" (*id.*); and it has successfully displaced appropriate judicial authorities and thereby "eliminated" attendant procedural "safeguards" (*id.* at 70).[16]

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[16] In fact, the scheme of "informal censorship" in this case is far more troubling than the comparable scheme in *Bantam Books*. There, the censoring agency could merely refer suspected obscenity violations to the Attorney General for prosecution. *See* 372 U.S. at 67-68. Here, the FCC *itself* can adjudicate additional forfeitures, can increase forfeiture penalties, and can exercise pervasive licensing and other formal authority (*see* 47 U.S.C. §§ 307-309). As Judge Tatel noted below, "unlike the 'free-roving' Commission in *Bantam Books* that had no regulatory control over the distributors it targeted, the FCC controls every aspect of a broadcaster's livelihood — indeed, its very existence." Pet. App. 28a.

Against this backdrop, the "additional factors" cited by the court of appeals are clearly insubstantial.

First, the court of appeals noted that *Bantam Books* "concerned the printed word, which, unlike broadcasting, has historically enjoyed the broadest protection under the first amendment." Pet. App. 21a. But as Judge Tatel explained, any substantive First Amendment differences between books and broadcasts "have no bearing on the fundamental *procedural* flaw in the FCC's forfeiture scheme." Pet. App. 26a (emphasis added). Moreover, *Bantam Books* itself involved obscenity, a category of speech entirely unprotected by the First Amendment — unlike the broadcast indecency at issue here. *See, e.g., Sable*, 492 U.S. at 124-26. Nonetheless, this Court demanded "the most rigorous procedural safeguards" in general (372 U.S. at 66), and "almost immediate" judicial review in particular (*id.* at 70).

Second, the court of appeals observed that the FCC "gives a putative violator notice and an opportunity to respond to the charge against it." Pet. App. 21a. That purported distinction is legally irrelevant, for *Bantam Books* squarely held that prompt judicial review is itself a necessary procedural requirement for any scheme of "informal censorship," regardless of whether additional safeguards are also present. *See* 372 U.S. at 70 ("We have tolerated such a system *only* where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.") (emphasis added). The distinction is also factually insignificant, because notice in the indecency forfeiture scheme is required only *after* an NAL has issued (47 U.S.C. § 503(b)(4)(A)), by which time the ultimate forfeiture is a foregone conclusion. Pet. App. 4a ("[T]he FCC has never failed to impose a forfeiture after issuing a[n] NAL.").[17]

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[17] The district court also had noted that the FCC, unlike the censoring agency in *Bantam Books*, sometimes explains its decisions. Pet. App. 58a. This distinction also is both legally irrelevant (because *Bantam Books* requires prompt judicial review independently of other additional safeguards) and factually insignificant (because the FCC's explanations are often perfunctory at best, *see, e.g., Notice of Apparent Liability to Greater Los Angeles Radio*, 7 FCC Rcd. 7321, 7321 (1992); *Notice of Apparent Liability to Independent Group Limited Partnership*, 6 FCC Rcd. 3711, 3711 (1990)).

Third, the court of appeals asserted that "the decisions of the FCC are subject to judicial review." Pet. App. 21a. But the FCC's informal threats are no more reviewable than those of the censoring agency in *Bantam Books*. Moreover, as for the FCC's formal indecency forfeiture orders, not a single one of them (since 1987) has been reviewed. And even if some broadcaster should someday endure the two- to seven-year delay and obtain a review, *Bantam Books* still holds that judicial review must be "assured" and "almost immediate" (372 U.S. at 70), not sporadic and severely delayed.

Fourth, the court of appeals observed that a broadcaster "need only move its arguably indecent material to a different time of day." Pet. App. 21a. That statement does not explain why the indecency forfeiture scheme is constitutional, but merely suggests that broadcasters can avoid enforcement by complying with the very FCC requirements that they claim are unconstitutional, and thus agreeing to forego judicial review.[18]

II. THE CONSTITUTIONALITY OF THE INDECENCY FORFEITURE SCHEME IS AN IMPORTANT AND RECURRING LEGAL QUESTION

The constitutionality of the indecency forfeiture scheme is an important and recurring question that warrants this Court's review.

The impact of the indecency forfeiture scheme is widespread. The standards articulated in FCC indecency forfeiture orders and

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[18] Even if the indecency forfeiture scheme did not clearly constitute a scheme of "informal censorship" within the meaning of *Bantam Books*, the First Amendment would still require prompt judicial review of the FCC's administrative indecency determinations.

NALs are intended to affect, and do affect, the daily programming decisions of almost 12,000 radio stations and over 1,542 television stations throughout the Nation. *See* News Release, Federal Communications Commission (Sept. 8, 1995). Those decisions, in turn, significantly restrict the range of programming available to millions of adult listeners and viewers, "reduc[ing] the adult population" to "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *see also Sable*, 492 U.S. at 128 (quoting *Butler*); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (same). Moreover, the FCC is resorting to the indecency forfeiture scheme with considerable and increasing frequency: it has issued almost 50 forfeiture orders or NALs since 1987 (*see supra* p. 9 & n. 10), and recently has announced the pendency of over 100 more. *See In the Matter of Sagittarius Broadcasting Corp.*, 1995 FCC Lexis 5924, at *4 (Sept. 5, 1995) (statement of Chairman Hundt). Finally, the indecency forfeiture scheme affects a wide range of protected speech, including news, informational programs, political advertising, drama, movies, music and satire.[19]

In holding that a censorship scheme need not ensure prompt review by statute (Pet. App. 15a-16a), the court of appeals has substantially undercut essential First Amendment protections and has failed to impose any meaningful check on unlawful agency action and delay. For example, while the FCC has taken between two and seven years to complete a process that "could probably be run" in "90 days" (Pet. App. 15a), the court below concluded that this delay was permissible because the FCC has done nothing "actively to discourage judicial review." Pet. App. 18a-19a. While the FCC has managed to prevent even a single indecency forfeiture order or NAL from being judicially reviewed, the court below concluded that this was unobjectionable because nothing

[19] *See, e.g., Notice of Apparent Liability to KSD-FM*, 6 FCC Rcd. 3689, 3689 (1990) (finding indecency despite "newsworthy nature of broadcast material"); Letter to Hon. John E. Bourne, Jr., from Chief, Mass Media Bureau (Apr. 7, 1988) (political advertisement). *See generally* Petition For Certiorari, *ACT III*, No. 95-520, at 3-5.

indicates the FCC "will fail to follow judicial guidelines" when and if such review should occur. *Id.* The First Amendment requires prompt judicial review to be guaranteed by statute in advance, to guard against even the "[r]isk" that a censor will delay (*Freedman*, 380 U.S. at 55); or that a court, when confronted with such delay in actual practice, will simply choose to ignore it.

Equally ominous is the court's holding that a plaintiff raising procedural challenges to a censorship scheme must prove that the scheme "burdens speech that is not indecent." Pet. App. 20a. It is far simpler to prove that a statute fails to ensure prompt judicial review than to prove that a censorship scheme restrains specific programs that are in fact protected from indecency restrictions. *Cf. Pacifica*, 438 U.S. at 750. To require the latter is to impose on speakers litigation burdens that are themselves unconstitutional: as this Court recognized in *Freedman*, unless the *censor* must prove that specific programs are *not* protected, "it may prove too burdensome [for the speaker] to seek review of the censor's determination." 380 U.S. at 59. Requiring speakers to prove the decency of their programs is especially inappropriate here, where the line between decency and indecency is "less than precise" (*ACT I*, 852 F.2d at 1342), and often difficult to discern. Moreover, to require such a *substantive* showing as the predicate for a *procedural* challenge is to eviscerate *Bantam Books*, *Freedman*, *Conrad* and the numerous other decisions holding that the First Amendment requires independent scrutiny of not only the substantive restrictions imposed by any scheme of censorship, but also the procedures used to determine those restrictions and to ensure their constitutionality.[20]

Finally, the indecency forfeiture scheme is particularly troubling — and this Court's review of the procedural challenge

[20] For these reasons, the court of appeals erred in suggesting that any concern about delay would be obviated if a broadcaster could seek a declaratory judgment that specific programs are not indecent. Pet. App. 21a-22a.

is particularly important — because the FCC's underlying indecency standards are so unclear. As Justice (then Judge) Ginsburg has explained, "vagueness is inherent" in the FCC's generic definition of broadcast indecency. *ACT I*, 852 F.2d at 1344. Whether or not that vagueness establishes an independent constitutional violation, it surely heightens the need for prompt judicial review. As this Court explained in *Bantam Books*, judicial review is especially critical where, as here, the underlying substantive standards are "vague and uninformative." 372 U.S. at 71.

CONCLUSION

The petition for a writ of certiorari should be granted.

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October 16, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5178

ACTION FOR CHILDREN'S TELEVISION; AMERICAN CIVIL LIBERTIES UNION; THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.; EVERGREEN MEDIA CORPORATION; EZ COMMUNICATIONS, INC.; FOX BROADCASTING COMPANY, INC.; FOX TELEVISION STATIONS, INC.; GREATER MEDIA, INC.; INFINITY BROADCASTING CORPORATION; MOTION PICTURE ASSOCIATION OF AMERICA, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS; NATIONAL PUBLIC RADIO; PEOPLE FOR THE AMERICAN WAY; POST-NEWSWEEK STATIONS, INC.; PUBLIC BROADCASTING SERVICE; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; SHAMROCK BROADCASTING, INC.; SOCIETY OF PROFESSIONAL JOURNALISTS; SOUTH FORK BROADCASTING CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION,
APPELLANTS,

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.

Decided July 18, 1995.

Before Edwards, *Chief Judge*, Ginsburg, and Tatel, *Circuit Judges*

GINSBURG, Circuit Judge:

Various broadcasters and public-interest groups representing listeners and viewers appeal a judgment of the district court dismissing their constitutional and statutory challenges to the Federal Communication Commission's scheme for imposing forfeitures for the broadcast of indecent material. The appellants'

central argument is that the procedures for enforcement set out in 47 U.S.C. §§ 503(b) and 504(c) lack appropriate safeguards—including prompt judicial review—which forces broadcasters to conform with potentially unconstitutional restrictions upon their speech. We hold that the provisions at issue are capable of constitutional implementation and therefore reject the appellants' facial challenge to the statutes. Though we agree that the FCC's implementation of its enforcement scheme is potentially troubling in some respects, we also conclude that the appellants have not alleged facts sufficient to show that the FCC is currently applying the statutes in an unconstitutional manner. We therefore affirm the judgment of the district court.

I. BACKGROUND

Section 1464 of 18 U.S.C. provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." In addition, the FCC may impose a civil forfeiture for each violation of the same statute. 47 U.S.C. § 503(b)(1)(D); *see id.* § 503(b)(2)(A) (maximum forfeiture penalty of $25,000 for each violation but not in excess of $250,000 for any continuing violation). The Commission's imposition of a penalty for the broadcast of indecent material—defined by the Commission as "patently offensive descriptions of sexual or excretory activities or organs as measured by contemporary community standards for the broadcast medium"—is not inconsistent with the first amendment. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (in which the Court also held that the FCC's ruling speech indecent does not violate 47 U.S.C. § 326, which prohibits censorship by the agency).

There are limits, however, to the FCC's authority to proscribe indecent speech. Unlike obscenity, indecent speech is protected under the first amendment; it may be regulated only by the least restrictive means necessary to promote a compelling state interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989). While

other cases have examined the substantive limits of the Government's ability to regulate broadcast indecency, *see Pacifica; Action for Children's Television v. FCC*, 58 F.3d 654, (D.C.Cir.1995) (en banc), the questions we address today concern only the procedures by which it does so.

A. The Enforcement Scheme

Section 503(b) of the Communications Act of 1934 authorizes the Commission to impose a forfeiture for the violation of a Commission order or regulation. While these provisions govern all types of forfeitures, the appellants challenge them only insofar as they are used to impose forfeitures arising from the broadcast of allegedly indecent materials.

The Commission may take either of two routes to impose a forfeiture. First, the Commission may proceed against a broadcaster under 47 U.S.C. § 503(b)(3), which authorizes the Commission to determine the penalty after a hearing, subject to review in the court of appeals. 47 U.S.C. §§ 402(a), 503(b)(3)(A). If, once the forfeiture determination becomes final, the penalty is not paid, then the Commission may refer the matter to the Attorney General for collection in the appropriate district court. 47 U.S.C. § 503(b)(3)(B). In such a collection action, "the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review." *Id.* While the Commission has stipulated that it generally does not use the procedures of § 503(b)(3) in imposing forfeitures for broadcast indecency, it reserves the authority to do so whenever that would "better serve the ends of justice." 47 C.F.R. § 1.80(g). Although the appellants claim that these procedures "ensure neither prompt administrative adjudication nor prompt completion of judicial review," they do not seriously challenge their constitutionality. In any event, because the Commission does not use § 503(b)(3), we express no view upon the subject.

The alternative, and in practice the exclusive, means of imposing a forfeiture for the broadcast of indecent material is for the Commission to issue a "notice of apparent liability" to the broadcaster, setting forth the relevant facts and granting the

potentially liable party "an opportunity to show, in writing, . . . why no such forfeiture penalty should be imposed." 47 U.S.C. § 503(b)(4). The Commission initiates the forfeiture process only after receiving a complaint from a listener or viewer. The agency staff reviews each complaint to determine whether it suggests that there has been a violation of the ban on indecent broadcasting. In the course of this review, the staff may send the broadcaster a Letter of Inquiry seeking more information or inviting the broadcaster to respond to the complaint. After further consideration, the Commission decides whether to issue a Notice of Apparent Liability (NAL). The stipulated facts in this case concerning the indecency cases pending when the complaint was filed in district court show that the Commission issues a NAL anywhere from six months to three years after the broadcast to which it relates. During that time, the broadcaster may or may not be aware that the agency is considering whether the broadcast at issue contained indecent material.

The NAL is both sent to the broadcaster and published in the FCC Record. The NAL advises the broadcaster of its "apparent liability for a forfeiture" in a stated amount for an "apparent violation of 18 U.S.C. § 1464," and gives the broadcaster 30 days to pay or otherwise to respond. *See, e.g., Letter to Mr. Mel Karmazin, President, Sagittarius Broadcasting Corporation*, 5 F.C.C. Rcd 7291 (December 7, 1990). Once the broadcaster has responded or the 30 days have run, the Commission decides whether to order the forfeiture. As far as we can discern from the current record, the FCC has never failed to impose a forfeiture after issuing a NAL.

The Commission's internal guidelines exhort the responsible officials "to initiate forfeiture orders expeditiously, generally within 60 days after issuance of [the NAL]." In the seven instances in which the Commission imposed a forfeiture between January 1987 and March 1993, it took from two to 23 months—and an average of approximately nine months—for the FCC to make its decision.

Generally the forfeiture order recapitulates the history of the case, addresses any arguments raised by the broadcaster in response to the NAL, and orders payment of the forfeiture within 30 days. As with any Commission order, the broadcaster may petition for reconsideration, *see, e.g., In the Matter of Liability of Sagittarius Broadcasting Corporation*, 7 F.C.C. Rcd 6873 (Oct. 23, 1992), *recon. denied*, 8 F.C.C. Rcd 3600 (May 20, 1993), *recon. denied*, 8 F.C.C. Rcd 7975 (Nov. 10, 1993), but it may not obtain judicial review at that stage. *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C.Cir.1977). If the order becomes final and the broadcaster does not pay the forfeiture, the Commission issues progressively stiffer dunning letters, and threatens to refer and after 165 days does indeed refer the matter to the Department of Justice "for commencement of [a] civil action . . . to recover the forfeiture," in accordance with 47 U.S.C. § 504(a). In defending that suit the broadcaster is entitled to a trial de novo on the question whether its broadcast was indecent. *Id.*

At the time the complaint in this case was filed, there were only three cases in which a broadcaster had held out long enough for the Commission to refer the matter to Justice, and the Department had actually filed only one case in district court. That case was settled after the court denied defense motions for partial judgment on the pleadings and for summary judgment. *See United States v. Evergreen Media Corp.*, 832 F.Supp. 1179 and 1183 (N.D.Ill.1993). Thus, as far as we can discern, no broadcaster has yet gone to trial on the merits of an FCC indecency determination, as envisioned by the statute; every one has either paid the forfeiture imposed or is awaiting action by the Commission or the Department of Justice.

Although the issue has never been litigated, we assume that the general five- year period of limitations on forfeiture proceedings, see 28 U.S.C. § 2462, would effectively prevent the Government from filing a civil action more than five years after the indecent material was aired. Once an action is timely filed, however, there is no law limiting the amount of time that may pass before the case is actually tried. In an extreme case, therefore, a

broadcaster could wait as long as six or seven years from the time a program was aired until its first opportunity for judicial review of the Commission's decision that the material was indecent.

By all indications, a long wait promises to be the rule rather than the exception. The single forfeiture suit pending in district court as of March 1993 was filed two days before the five-year statute of limitations would have run, and was apparently close to disposition a little more than a year later. *Evergreen Media*, 832 F.Supp. 1179 and 1183. Based upon the shortest times reflected in the record, the earliest a broadcaster could hope to be brought into court is some two years after the offending broadcast.

This delay is unfortunate enough, but a number of other factors serve to exacerbate the effects of uncertainty about the outcome. First, a broadcaster claiming that a forfeiture is unconstitutional runs the risk of incurring an increased forfeiture for any subsequent indecency violation, *see, e.g., Letter to Mr. Mel Karmazin, President, Sagittarius Broadcasting Corporation*, 8 F.C.C. Rcd 2688, 2689 & n. 3 (December 18, 1992) (giving notice of intent to impose $600,000 forfeiture in light of "apparent pattern of indecent broadcasting"), and the possibility that the Commission will invoke the ultimate sanction, revocation of the broadcaster's license. *See* 47 U.S.C. §§ 307-309. Second, individual Commissioners have taken an active public role in criticizing broadcasters for airing indecent material and have let it be known that sanctions for such activity are likely to increase. Furthermore, the Commission will not, as a matter of policy, issue a declaratory ruling on whether a proposed broadcast is indecent. Thus, the only official guidance about the Commission's standards of decency available to a broadcaster is what can be gleaned from published NALs and forfeiture orders.

Against this background, the parties to this case have stipulated that:

> At a hearing, plaintiff broadcasters would testify that because of the delays of securing administrative and judicial determinations in indecency forfeiture proceedings, and uncertainties as to the permissible scope of FCC indecency regulation, they attempt to conform their conduct to the indecency standards articulated by the FCC and its Commissioners, whether or not they believe those standards are constitutional, especially because of the various sanctions to which broadcasters are potentially subject.

The FCC does not concede that this testimony would be credible, but in light of the district court's grant of summary judgment to the Commission we must accept the appellants' version of the facts.

B. The Appellants' Claims

The appellants do not argue that the delay they face in getting a final decision under the Commission's procedures is in itself unconstitutional. Rather they claim that the delay allows the FCC to take action against them without affording them the procedural safeguards necessary to avoid any abridgment of their first amendment rights.

The appellants challenge the forfeiture scheme on both constitutional and statutory grounds. As to the former, they claim that by forcing broadcasters to comply with the Commission's unreviewed determinations of indecency the scheme operates as a system of "informal censorship" similar to the one held unconstitutional in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). As to the latter, they argue that the Commission also forces broadcasters to comply with its (perhaps invalid) standards by taking unpaid and unreviewed forfeiture orders into account in assessing subsequent forfeitures, *see, e.g., Letter to Mr. Mel Karmazin, President, Sagittarius Broadcasting Corporation*, 8 F.C.C. Rcd 2688, 2689 & n. 3 (December 18, 1992) (giving notice of intent to impose forfeiture in light of "apparent pattern of indecent broadcasting"), in violation of the anti-bootstrapping provision of the Act, 47 U.S.C. § 504(c). That section provides:

> In any case where the Commission issues a [NAL] looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice

was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

Faced with these same claims and on cross-motions for summary judgment, the district court held that: (1) it had subject-matter jurisdiction over the appellants' facial challenge to the constitutionality of the forfeiture scheme; but (2) owing to the primary jurisdiction of the Commission, the court did not have jurisdiction over the appellants' bootstrapping claim based upon 47 U.S.C. § 504(c); (3) the plaintiffs representing listeners and viewers do not have standing to challenge the forfeiture scheme; (4) the broadcaster plaintiffs that had never been subject to a forfeiture order do not have standing to challenge the scheme; (5) as for the three broadcaster plaintiffs that had received NALs, the claims of the one that was then challenging the forfeiture in another forum should be dismissed as a matter of comity, and the claims of a second were not ripe as no forfeiture had yet been imposed, but the claims of the third were reviewable; and, finally, (6) the enforcement scheme is not unconstitutional. *Action for Children's Television v. FCC*, 827 F.Supp. 4 (D.D.C.1993).

II. JURISDICTION

All of the issues raised in this appeal are matters of law, which we review de novo. We affirm the judgment of the district court because we come independently to the same conclusions.

A. The Constitutional Claim

Although none of the parties now questions the district court's jurisdiction over the plaintiffs' constitutional claim, we have an independent obligation to consider the matter, for our own jurisdiction depends upon it. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607- 08, 107 L.Ed.2d 603 (1990). Because a facial challenge to the constitutionality of a federal statute raises a federal question, the district court would ordinarily have jurisdiction under 28 U.S.C. § 1331. When an agency is involved, however, the issue is more complicated.

In *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 72 (D.C.Cir.1984) (*TRAC*), we held that "where a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review." In this case the district court rejected the Commission's argument that *TRAC* ousts it of jurisdiction, holding that there is a general exception to *TRAC* for constitutional claims. 827 F.Supp. at 10 n.6. We have encountered the question of such an exemption before, but we have not had to resolve it. *See Ticor Title Insurance Co. v. FTC*, 814 F.2d 731, 743 (D.C.Cir.1987) (opinion of Edwards, J.); *id.* at 757 (opinion of Green, J.); *Ukiah Adventist Hospital v. FTC*, 981 F.2d 543, 550-51 (D.C.Cir. 1992). Nor need we do so today.

The district court was authorized to decide this case without need for an exception to *TRAC* because it is the district court that would have original jurisdiction over an FCC forfeiture proceeding. In other words, the district court's jurisdiction over the plaintiffs' challenge to the constitutionality of the forfeiture statute is no threat to the jurisdiction of the court of appeals because review of a Commission order imposing a forfeiture (in the defense against a collection suit) would itself be in the district court, not in the court of appeals.

B. The Statutory Claim

In the absence of a definitive ruling by the Commission, the district court properly declined to address the plaintiffs' claim that the Commission's administration of the forfeiture scheme violates 47 U.S.C. § 504(c) because it takes previous incidents of alleged indecency into account when assessing a forfeiture. The Congress has given the district court jurisdiction to review a Commission decision imposing a forfeiture decision only in the course of a suit brought by the United States to collect the forfeiture. 47 U.S.C. § 504(a). Well-established principles of administrative law, moreover, dictate that the courts allow the agency to interpret the law before they determine whether the agency has violated it. *See McCarthy v. Madigan*, 503 U.S. 140, 144-47, 112 S.Ct. 1081,

1086-87, 117 L.Ed.2d 291 (1992) (recounting reasons for requiring exhaustion of agency remedies prior to judicial review).

The parties and the district court addressed the question of the district court's jurisdiction solely as the reciprocal of the Commission's primary jurisdiction; they would have been more appropriately concerned with the plaintiffs' failure to exhaust their administrative remedies. *See generally Reiter v. Cooper*, U.S. 113 S.Ct. 1213, 1220, 122 L.Ed.2d 604 (1993) (discussing this distinction). Although it is true that the Commission did not have a prior opportunity to apply its expertise to the interpretation of the statute in the light of the plaintiffs' objections, a concern addressed by the doctrine of primary jurisdiction, that is only because the plaintiffs were trying to shortcut the administrative process—an effort barred by the requirement that they first exhaust their administrative remedies. *See id.*

As the Supreme Court pointed out in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64, 77 S.Ct. 161, 164-65, 1 L.Ed.2d 126 (1956):

> "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction" . . . applies when a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.

While the present claim raises a question of first impression for the Commission, as is often the case as well where the doctrine of primary jurisdiction applies, *see, e.g., Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973), that does not remove it from the ambit of the exhaustion requirement; indeed, the novelty of the question of statutory interpretation is an additional reason that the court should allow the administrative process to run its course before taking the matter into its own hands.

Regardless of the label employed, however, the substance of the matter is clear: it would be premature for a court to interpret the statute in a void, i.e., without the agency itself—as opposed to the lawyers defending the agency in court—having done so first. In this case there is not even an allegation before the court that the agency violated the statute in any particular case. The closest the plaintiffs come is the stipulation that "[i]n determining whether to increase the amount of a forfeiture because of a pattern of indecent broadcasting, the FCC has twice cited prior alleged indecent broadcasts that are the subject of contested and judicially unreviewed indecency forfeitures." *See Letter to Mr. Mel Karmazin, President, Sagittarius Broadcasting Corporation*, 8 F.C.C. Rcd 2688, 2689 & n. 3 (December 18, 1992); *Letter to Evergreen Media Corp.*, 8 F.C.C. Rcd 1266, 1267 & n. 5 (February 25, 1993). So far as we are informed, however, in neither of those cases had the Commission imposed an increased forfeiture upon the basis of the prior allegations. The district court in this case was in no position even to consider the propriety of the forfeitures in those cases: the amount of each contemplated forfeiture was clearly within the limit authorized by the statute, and the agency had yet actually to impose it.

The broadcasters involved in any pending forfeiture cases are, of course, free to make their own § 504(c) arguments before the agency (and again before the district court if necessary). The Commission itself may then adopt or not, as it thinks best, agency counsel's current litigation position, and we presume it will also then provide an explanation for its policy choice.

In a strikingly similar situation, Judge Sneed once wisely observed:

> The position of the FCC in this lawsuit is clear enough . . . . It is not known, however, what the position of the FCC would have been, or in the future will be, when confronted by the plaintiffs' claim in a proper administrative proceeding . . . . Children shortly after leaving the cradle understand the difference between being forced to defend against a charge of naughtiness and being asked to consider whether they thought

they had been nice. In the latter posture their response is much more likely to be open and forthcoming. Human psychology does not change too much between the cradle and the grave.

Writers Guild of America West, Inc. v. American Broadcasting Co., Inc., 609 F.2d 355, 364 (9th Cir.1979) (involving a similar confluence of concerns about exhaustion and primary jurisdiction). We agree. Therefore we affirm the district court's dismissal of the plaintiffs' statutory claim.

C. Standing And Ripeness

The district court concluded that only one of the plaintiffs, Infinity Broadcasting, has both standing and a constitutional claim ripe for adjudication. 827 F.Supp. at 12-16. The Commission concedes Infinity's standing but argues that its claim is not ripe.

We agree with the district court and the parties that Infinity has standing. The Commission imposed a $6,000 forfeiture against Infinity in October 1992. *See In the Matter of Liability of Sagittarius Broadcasting Corporation*, 7 F.C.C. Rcd 6873 (Oct. 23, 1992), *recon. denied*, 8 F.C.C. Rcd 3600 (May 20, 1993), *recon. denied*, 8 F.C.C. Rcd 7975 (Nov. 10, 1993). Keeping in mind that "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint," *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264, 111 S.Ct. 2298, 2306, 115 L.Ed.2d 236 (1991), we accept Infinity's allegation that it is suffering collateral effects of that forfeiture determination—arguably in violation of the first amendment. Specifically, Infinity alleges that it is "chilled" from broadcasting protected speech for fear that the Commission will impose upon it a new forfeiture and will increase the amount of the penalty on the ground that Infinity has violated the indecency ban before. In view of the substance of Infinity's complaint—that the forfeiture scheme operates as a scheme of informal censorship—we conclude that Infinity meets the requirements of Article III, i.e., that it is suffering a concrete injury traceable to the challenged conduct and likely to be redressed by a favorable decision. *See Freedom*

Republicans, Inc. v. FEC, 13 F.3d 412, 415 (D.C.Cir.1994) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)). *See also Bantam Books*, 372 U.S. at 64 n. 6, 83 S.Ct. at 636 n. 6 (discussing publisher's standing to challenge regulation by standards of which commission suspected its books were illegal).

The Commission argues that Infinity's claim is not ripe for adjudication because the broadcaster does not allege sufficient hardship to justify judicial interference with an on-going agency proceeding. The FCC also points out that at the time Infinity filed the complaint in this case the company was still seeking Commission reconsideration of the forfeiture order, further undermining its claim that the court should hear its complaint outside of the ordinary process for review of a forfeiture order.

Ripeness turns upon two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Infinity's claim is a legal one, abstracted from the particular facts of any forfeiture. There is no dispute about the working of the procedures being challenged and there is therefore little or nothing more that the agency could do in a particular adjudication that would likely inform the court's decision on the question whether the enforcement scheme is currently being, or is capable of being, administered in accordance with the first amendment.

Under the law of this circuit, once we have determined that an issue is clearly fit for review, there is no need to consider "the hardship to the parties of withholding court consideration," *Abbott Laboratories*, 387 U.S. at 149, 87 S.Ct. at 1515, because there would be no advantage to be had from delaying review. *See Great Lakes Transmission Limited Partnership v. FERC*, 984 F.2d 426, 431 & n. 9 (D.C.Cir.1993). Denying immediate review would be particularly ironic in this case: if Infinity has a valid claim, delay would only exacerbate the very wrong of which it complains. A collateral claim that certain procedures are unconstitutional because they unduly postpone judicial review is

ripe when the claimant is adversely affected by those procedures. Under the Commission's suggested approach—that Infinity wait until the United States institutes a collection proceeding in the district court before challenging the procedures that put it there—the broadcaster would have to wait until judicial review is at hand before it could argue that judicial review does not come soon enough.

Tellingly, the Commission does not argue that this dispute would look any different, be more ripe if you will, were we to put off review until another day. As the Supreme Court has said:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

Columbia Broadcasting System v. United States, 316 U.S. 407, 425, 62 S.Ct. 1194, 1204, 86 L.Ed. 1563 (1942). Though we ultimately conclude that the FCC is not operating a scheme of informal censorship like the one held unconstitutional in Bantam Books, the possibility that the agency's actions might similarly run afoul of the first amendment demands prompt judicial scrutiny.

III. THE MERITS

At oral argument in this court, counsel for the appellants made it clear that they are challenging the scheme for enforcing forfeitures (for indecent broadcasts only) both on its face and as applied. Because of the very general nature of the statutory provisions at issue, and because there is no individual forfeiture case before the court, we are in no position to assess the application of the Commission's procedures to any specific case. On the other hand, the Commission has stipulated that its practices in applying the forfeiture scheme in indecency cases are as described in the record. We are being asked, therefore, to evaluate a process that is more fleshed-out than those courts often

see in cases raising a facial challenge to a statutory scheme that is not highly specified. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987).

Accordingly, we shall take the appellants at their word and answer two questions: (1) Are the statutes that prescribe the procedures by which the Commission may impose a forfeiture for the broadcast of indecent material capable of constitutional application? and (2) If so, then does the record show that the Commission is applying the statutes in a constitutional manner?

A. The Facial Challenge

The Supreme Court has repeatedly emphasized that:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [Act] would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.

Rust v. Sullivan, 500 U.S. 173, 183, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991) (quoting with changes *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)). With this teaching in mind, we readily reject the appellants' claim insofar as they are arguing that the statutory enforcement scheme is incapable of constitutional application with regard to indecency violations. Prompt and efficient enforcement by the Commission could surely expedite the administrative process to an extent that leaves ample breathing space for first amendment rights.

Certainly nothing in the statutes or regulations prevents the Commission from issuing a NAL, imposing a forfeiture, and if need be referring a case to the Department of Justice all within a period of time short enough virtually to eliminate any concern with delay. The whole course could probably be run in most cases within, say, 90 days. No case of this type is very complex;

each turns simply upon whether a certain broadcast was indecent. Indeed, under the Commission's own internal guidelines, after a broadcaster has had 30 days to respond to the NAL, the target for imposing a forfeiture is only 60 more days. If the FCC met this goal and then allowed the broadcaster to stipulate that it will not pay unless ordered by a district court to do so, then judicial review could begin almost immediately. *Cf.* 47 C.F.R. § 1.822(b) (providing for expedited FCC hearing procedures); 29 C.F.R. § 101.17, *et seq.* (expedited bargaining-unit certification procedures under the NLRA); 49 U.S.C. § 10905 (expedited land-valuation procedures under the Interstate Commerce Act); 18 U.S.C. § 3161, *et seq.* (Speedy Trial Act). In practice, no case has moved through the pipeline that quickly, but we are aware of no reason why the Commission could not, in principle, act with such dispatch. Reducing delay would also cabin the Commission's opportunity to rely upon its own unreviewed forfeiture decisions in setting standards of decency, thereby reducing the tendency for one unconstitutional decision to beget others.

In short, the FCC's indecency-enforcement scheme is clearly capable of constitutional application. Indeed, were the administration of this scheme merely expedited it would be indistinguishable, relative to the first amendment concern, from the undoubtedly constitutional process whereby the Government may bring a criminal action in district court for a violation of 18 U.S.C. § 1464.

B. The Challenge To The Statutes As Applied

The more difficult question is whether the statutes as applied pass muster under the teaching *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). We agree with the appellants that some of the Commission's procedures are troubling but, on the basis of the record before us, we cannot agree that those procedures violate the first amendment. The centerpiece of the appellants' grievance is that:

> [B]ecause of the delays of securing administrative and judicial determinations in indecency forfeiture proceedings, and uncertainties as to the permissible scope of FCC indecency regulation they attempt to conform their conduct to the indecency standards articulated by the FCC and its Commissioners, whether or not they believe those standards are constitutional.

That simply does not establish a violation of the Constitution.

In *Bantam Books*, Rhode Island had established a Commission to Encourage Morality in Youth and authorized it to determine whether publications were "objectionable for sale, distribution or display to youths." 372 U.S. at 61, 83 S.Ct. at 634. Upon an affirmative finding, the Morality Commission would send a letter urging the distributor of the offending material not to carry the publication, and would refer the matter to the local police for investigation and possible prosecution under the state obscenity law. *Id.* at 62, 83 S.Ct. at 635. The Supreme Court struck down this scheme because it "amount[s] to . . . governmental censorship devoid of the constitutionally required safeguards for state regulation of obscenity, and thus abridge[s] First Amendment liberties." *Id.* at 64, 83 S.Ct. at 636.

The lesson of *Bantam Books* is that the state may not move to suppress speech by means of a scheme that, as a practical matter, forecloses the speaker from obtaining a judicial determination of whether the targeted speech is unprotected, lest the state be able effectively to suppress protected speech. In that case it was established, as a matter of fact, that a notice from the Commission would cause the distributor to cease selling the listed publications without a judicial determination of whether the material was legally subject to proscription. *Id.* at 62-64, 83 S.Ct. at 635-36. Thus, the Court concluded, "What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Id.* at 70, 83 S.Ct. at 639.

The appellants argue that the FCC has similarly implemented a system of "prior administrative restraint" that, for want of appropriate procedural safeguards, forces protected and unprotected material alike off the air. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) (striking down motion-picture censorship scheme for lack of such safeguards). Unlike the state in *Freedman*, however, the Commission is not administering anything akin to a literal prior restraint. Broadcasters are free to air what they want; if and only if what they air turns out to transgress established guidelines do they face a penalty—but that is very much after the fact, not prior thereto. The Commission's ability to penalize a broadcaster in this manner was upheld by the Supreme Court in Pacifica, where the Court specifically rejected the argument that the agency's enforcement of the ban on indecency violates the statutory prohibition of censorship by the Commission. *See* 438 U.S. at 735-38, 98 S.Ct. at 3033-35.

As the Court recognized in *Bantam Books*, however, a scheme may also be a prior restraint in effect even though specific materials are not evaluated prior to publication (or here broadcast) if that scheme in practice causes a speaker of reasonable fortitude to censor itself in order to conform with an unconstitutional standard. This case therefore turns upon the question whether the regime that leads broadcasters to "attempt to conform their conduct to [FCC] indecency standards" is analogous to the scheme that forced booksellers in Rhode Island to drop publications officially declared "objectionable" for fear of a possible prosecution for selling obscene materials.

We cannot help but conclude that the appellants have failed to establish any essential similarity between this case and *Bantam Books*. Unlike the Rhode Island Commission, which sought to regulate materials that could not be proscribed as obscene, 372 U.S. at 62 n. 4, 83 S.Ct. at 635 n. 4, so far as this record shows the FCC is not enforcing the statutory ban on indecency against material that is not indecent. Again unlike the Rhode Island Commission, which could and did avoid judicial oversight because the mere threat of prosecution coerced booksellers into

complying with its recommendations, *id.* at 62 n. 5, 83 S.Ct. at 635 n. 5, we have no indication that the FCC has done anything actively to discourage judicial review of any indecency forfeiture it imposed. That no case has yet progressed to judicial review may be the effect of any of several inoffensive causes: the Commission has only recently stepped up its enforcement efforts; the violators penalized thus far may very well have broadcast the indecency as charged and thus seen no point in contesting the forfeiture in court; and broadcasters may be self- censoring only indecent material, eliminating the need for many prosecutions. Indeed, some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available. *See Pacifica*, 438 U.S. at 743, 98 S.Ct. at 3037 ("At most [self-censorship] will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of the references may be protected, they surely lie at the periphery of First Amendment concern").

Finally, there is no indication that the FCC—unlike Rhode Island's free-roving Commission to Encourage Morality in Youth, 372 U.S. at 70, 83 S.Ct. at 639—has failed or will fail to follow judicial guidelines for determining what is indecent and what is not, as they have developed and will 59 F.3d 1249 develop in judicial decisions. The suggestion that every determination of indecency must be a judicial one simply proves too much; the Commission could then play no role in developing or enforcing the Congress's declared policy of banning indecency from the air-waves during certain hours of the day. We have no indication that the Commission is developing a body of precedent in any way at odds with the first amendment, or that the agency would continue to do so in the face of a corrective court decision. While the prospect of a forfeiture trial may understandably cause some broadcasters to forego judicial review of a Commission determination that a program was indecent, we find no indication in this record that the FCC is taking the opportunity afforded thereby to impose unconstitutional restrictions upon broadcast speech.

Under the statute as administered, a broadcaster need do nothing at all until it is served with a complaint, at which point it is entitled to a trial de novo in district court. Nothing but the timing would be different if the Congress were to change the current scheme so as to allow the Commission to bring a forfeiture action in district court immediately after the airing of an allegedly indecent broadcast, which would be unquestionably constitutional. The distinction, i.e., the delay inherent in the current scheme, is of constitutional significance only if it burdens broadcast speech that is not indecent. The parties have stipulated that some speech is being burdened in that broadcasters "conform their conduct to the indecency standards articulated by the FCC . . . whether or not they believe those standards are unconstitutional." The broadcasters would go one step farther and argue that the delay thereby chills protected as well as indecent speech; however, they have failed to make any such showing.*

Alternatively, the broadcasters' claim might be more compelling if in a particular case the Commission increased the fine for a subsequent violation or decided not to renew a license when the broadcaster had neither acquiesced in the former determination of indecency nor yet had its day in court. Such a situation creates a greater risk that material that is not indecent is being kept off the air. Even that, however, would still be the stuff upon which

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* Our dissenting colleague points out (at 1) that no one can "show that non-indecent speech is unaffected by the forfeiture scheme, since an impartial, independent Article III court has never evaluated any of the Commission's indecency decisions"; the plaintiffs in this case, however, have failed to allege that non-indecent speech is being affected. While the Government does have "the burden of instituting judicial proceedings, and of proving that thee material is unprotected" (dissent at 1266-67) when it seeks to impose liability for an indecent broadcast, the broadcasters brought this case and they had the burden of alleging a set of facts that would, if proved, entitle them to the relief they seek. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986).

an individual, not a generic, challenge to enforcement would be built.

Several additional factors might also serve to distinguish the scheme administered by the Commission from the one struck down in *Bantam Books*. As the district court noted: (1) that case concerned the printed word, which unlike broadcasting, has historically enjoyed the broadest protection under the first amendment; (2) the FCC, unlike the Rhode Island Commission, gives a putative violator notice and an opportunity to respond to the charge against it; (3) the decisions of the FCC are subject to judicial review; and (4) the broadcaster that would avoid a dispute with the FCC need only move its arguably indecent material to a different time of day, not refrain from broadcasting it altogether. In light of the appellants' failure to show that speech that is not indecent is in fact being chilled, however, we need not decide whether these differences actually serve to distinguish the two regimes. Still, they are points of difference, and they serve to underscore the bottom line: The allegation that the FCC is chilling protected speech by means of the forfeiture scheme is not nearly as compelling as was the corresponding claim in Bantam Books. There is no indication in the case law that such a scheme is unconstitutional absent some showing that the agency is forcing off the air material that is not indecent.

IV. CONCLUSION

Although the appellants have failed to show that the Commission's administration of the statute is unconstitutional, we cannot fail to acknowledge that the agency's practices could give rise to some of the evils that the appellants claim are already at hand. Two avenues of relief are available, however, to any broadcaster that in fact comes to the grief alleged in this case. First, the broadcaster could stipulate the facts giving rise to the Notice of Apparent Liability and state that it will not pay the forfeiture unless ordered to do so in district court; the Commission could then forward the matter to the Department of Justice immediately, so that the broadcaster could get a trial on the merits of the forfeiture relatively quickly.

Alternatively, if the Commission will not cooperate in order to expedite judicial review as outlined above, then as we noted in Pleasant Broadcasting, 564 F.2d at 502, a broadcaster "suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding . . . could bring a declaratory judgment action against the United States in the district court." A broadcaster that refrains from airing material that is not indecent because of a legitimate fear, based upon the Commission's prior indecency cases, that it would be subject to a forfeiture should in this way be able promptly to dispel any unwarranted chilling effect. Its claim would seem to be ripe for review if it is suffering a current injury that could be remedied by a judicial determination that the material is not indecent. In short, a broadcaster is free to prove up, in a specific case, the general claim that we adjudge deficient today.

For the reasons stated in Parts II and III above, the judgment of the district court is

Affirmed.

EDWARDS, *Chief Judge, concurring with reservations*: After grappling in recent months with several cases involving the application of the First Amendment in the context of Government regulation of "indecent" speech in the broadcast media, *see, e.g.*, *Action for Children's Tel. v. FCC*, 11 F.3d 170, 183-86 (D.C.Cir.1993) (Edwards, J., concurring); *Alliance for Community Media v. FCC*, 56 F.3d 105, 110-11 (D.C.Cir.1995) (en banc) (Edwards, C.J., dissenting in part); *Action for Children's Tel. v. FCC*, 58 F.3d 654, 670-83 (D.C.Cir.1995) (en banc) ("*ACT III*") (Edwards, C.J., dissenting), I have come to the conclusion that the law is in a state of disarray. Application of the First Amendment in this context seems to border on whimsical, for as often as not there is little coherence in the case law. For example; I have yet to comprehend the distinction that is drawn between *broadcast* and *cable* television, with broadcast stations having reduced First Amendment rights even though cable is concededly much more responsible for the showing of indecent

programming. This is but a tip of the iceberg, so I will not dwell on my incredulity.

I join the majority opinion, because, absent any aspirational gloss, I believe that it is essentially correct in stating and applying extant law. This is not to say that the extant law makes any sense when considered carefully, but that is a matter beyond my authority.

My concurrence comes with a caveat, however. Not surprisingly, the majority opinion is underscored by several references to *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). However, insofar as Pacifica commands a distinction in the treatment of broadcast and cable media in the application of the First Amendment, I think that it has no place in our constitutional jurisprudence. *See ACT III*, 58 F.3d at 672-77 (Edwards, C.J., dissenting). Indeed, although the Supreme Court declined to revisit *Pacifica* in its recent decision in *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2456-57, 129 L.Ed.2d 497 (1994), I do not understand how the two opinions can stand together. Although I reject *Pacifica*, I do not doubt that the Government can regulate "indecent" speech, so long as "the Government's interests [are] 'compelling,' and the method of regulation chosen [is] 'the least restrictive means' to achieve those compelling interests." *ACT III*, 58 F.3d at 677 (Edwards, C.J., dissenting) (quoting *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989)). Under this standard, I believe that, in order to justify the regulation of indecency, the Government must show that the "harms" it seeks to prevent "'are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Id.*, 58 F.3d at 680 (quoting *Turner Broadcasting*, 114 S.Ct. at 2470). There is no showing of harm in this case, so I remain doubtful about the constitutionality of sections 503(b) and 504(a) of the Communications Act, 47 U.S.C. §§ 503(b), 504(a) (1988).

At bottom, there are two reasons why the concerns that I expressed in *ACT III* do not carry the day for me here. First, the

principal claim of the appellants in this case is that the FCC's delay in enforcing the statute allows the agency to take action against them without affording them the procedural safeguards necessary to avoid any abridgement of their First Amendment rights. This position implicitly assumes that the regulation itself is constitutionally permissible, so the points that I addressed in *ACT III* do not come into play in this case. Second, in *ACT III*, a majority of the en banc court indulged a presumption that exposure to indecent speech always is harmful to minors. I disagree with this finding, for, in my view, it rests on a baseless proposition. Nonetheless, *ACT III* is the law of the circuit, so I am bound by the court's holding in that decision.

I agree with the majority opinion that there are some serious problems with the current practice followed by the FCC in administering sections 503(b) and 504(a), and that "the agency's practices could give rise to some of the evils that the appellants claim are already in hand." Appellants cannot prevail in this case, however, because they have failed to show that speech that is not indecent is in fact being chilled. If such a claim is supported in the future, the parties will face a different result.

I conclude with an innocent hope that the Supreme Court will one day soon lend some clarity to these areas of First Amendment jurisprudence. And with that hope, I concur.

TATEL, *Circuit Judge*, dissenting: Because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn," the Supreme Court requires the use of "sensitive tools," including prompt judicial review, to draw that line. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 70, 83 S.Ct. 631, 637, 639, 9 L.Ed.2d 584 (1963) (internal quotation marks and citations omitted). As the Court has said, "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965). The Federal Communications Commission certainly could implement its indecency forfeitures under section 503(b)(4) in a constitutional

manner by allowing "judicial review [to] begin almost immediately." Majority opinion (Maj.Op.) at 1259. But it does not. The stipulated record in this case demonstrates that the Commission's actual implementation of the statute is characterized by years of delay and a total lack of judicial review: of the thirty-six FCC indecency forfeiture orders issued since 1987, not one has been reviewed by a court; and individual indecency forfeiture orders take from two to seven years to get to court, if they get there at all. Stipulations of Fact PP 19, 21, *in* Joint Appendix (J.A.) at 46, 47 & 95-102.

The court nonetheless rejects appellants' challenge to the FCC's indecency forfeiture enforcement scheme, explaining that because the broadcasters have not proven the chilling of non-indecent speech, they have failed to demonstrate the requisite harm. *See* Maj. Op. at 1261-62. With all due respect, it is not clear to me how anyone could show that non-indecent speech is unaffected by the forfeiture scheme, since an impartial, independent Article III court has never evaluated any of the Commission's indecency decisions. To me, however, the constitutional infirmity of the FCC forfeiture enforcement scheme turns not on whether the broadcasters have explicitly alleged the chilling of non-indecent speech—although I think such an allegation is inherent in their First Amendment challenge to this scheme—but on the fact that it exhibits the same basic procedural inadequacies as the censorship scheme that the Supreme Court found unconstitutional in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

In *Bantam Books*, Rhode Island's "Commission to Encourage Morality in Youth" was responsible for identifying publications with "obscene, indecent or impure language." *Id.* at 59-60, 83 S.Ct. at 633. The Commission wrote letters to distributors informing them of certain "objectionable" publications within their inventory and reminding them of the Commission's duty to report violations of the obscenity laws to the Attorney General for prosecution. *Id.* at 61-62, 83 S.Ct. at 634-35. The trial court found that distributors receiving such letters discontinued the sale of the objectionable materials. *Id.* at 63, 83 S.Ct. at 635.

According to the Supreme Court, the Rhode Island Commission operated a system of "informal censorship" of books and publications that it found obscene or otherwise objectionable by means of "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *Id.* at 67, 83 S.Ct. at 637. The Court invalidated the Commission's "radically deficient" procedures, finding that they provided no "judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness." *Id.* at 71, 83 S.Ct. at 640.

Like the Rhode Island Commission to Encourage Morality in Youth, the FCC censors speech, buttressing its informal powers through coercion and intimidation. The Rhode Island Commission warned that it would refer violators to the Attorney General, *id.* at 62-63, 83 S.Ct. at 635-36; the FCC threatens to increase fines, revoke licenses, and prevent acquisition of additional stations, see Stipulations of Fact PP 26-27, *in* J.A. at 48-49. While judicial review is possible in both schemes—a criminal obscenity prosecution in *Bantam Books* and civil enforcement of FCC forfeiture orders here—in neither case are the parties practically able to obtain judicial review within any reasonable time frame.

It is true that the FCC's indecency forfeiture scheme involves a different medium of communication than the one in *Bantam Books* and that it includes a late-night safe-harbor period during which the "arguably indecent material" may be broadcast. Maj.Op. at 1261-62. These differences, however, have no bearing on the fundamental procedural flaw in the FCC's indecency forfeiture scheme. Like the "system of prior administrative restraints" invalidated in *Bantam Books*, 372 U.S. at 70, 83 S.Ct. at 639, the FCC is an administrative agency charged with evaluating the decency of broadcasts and operating, in practice, without judicial review. "Because the censor's business is to censor," the Supreme Court has consistently warned that administrative agencies "may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Freedman*, 380 U.S. at

57-58, 85 S.Ct. at 738-39; *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560-61, 95 S.Ct. 1239, 1247-48, 43 L.Ed.2d 448 (1975); *see also* Henry P. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 523 (1970) (agencies tend to have a "narrow and restricted viewpoint" that is "particularly pernicious in the obscenity area" because "those constantly exposed to the perverse and the aberrational in literature are quick to find obscenity in all they see."). When administrators have "unbridled discretion" to suppress speech, prompt review is all the more critical to minimize "the danger of censorship and of abridgment of our precious First Amendment freedoms." *Conrad*, 420 U.S. at 553, 560, 95 S.Ct. at 1244, 1247.

In my view, moreover, the FCC's indecency forfeiture scheme poses a greater threat to free expression than the system the Supreme Court struck down in *Bantam Books*. For one thing, the FCC's forfeiture scheme regulates indecent speech, which is protected by the First Amendment, whereas in Bantam Books the Supreme Court addressed the regulation of obscenity, which is not constitutionally protected. Because a "dim and uncertain line" separated obscenity from constitutionally protected speech, *Bantam Books* held that "sensitive tools" were needed to separate protected from unprotected speech. *Bantam Books*, 372 U.S. at 66, 83 S.Ct. at 637. Such tools are even more critical where, as here, constitutionally protected speech lies on both sides of an equally imprecise line.

Not only is judicial review unavailable, but the Commission relies on its unreviewed indecency determinations to impose increased penalties on broadcasters that air material the FCC has previously declared indecent. In several instances, the Commission has doubled and tripled forfeitures, explaining that past violations "establish a pattern of apparent misconduct warranting the fine we set today," *Letter to the Rusk Corp.*, 8 F.C.C. Rcd 3228, 3229 n. 3 (1993); that "the violation was repeated, and . . . your past compliance history includes similar apparent misconduct," *Letter to Evergreen Media Corp.*, 8 F.C.C. Rcd 1266, 1267 (1993); and that the broadcast was

"egregious," given the Commission's prior determination that the same material was indecent, *Letter to KGB Inc.*, 7 F.C.C. Rcd 3207, 3207 (1992). While individual Commissioners admonish broadcasters "to learn from the actions that are out there," Doug Halonen, *Marshall Defines Stance on Indecency*, Elec. Media, Jan. 15, 1990, at 136, *in* J.A. at 93, at the same time the Commission evaluates the decency of material on a "case-by-case" basis, frequently rejecting broadcasters' defense that the aired material was similar to material that the FCC had previously chosen not to sanction, *see, e.g., Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C. Rcd 6873, 6874 (1992).

Finally, unlike the "free-roving" Commission in *Bantam Books* that had no regulatory control over the distributors it targeted, the FCC controls every aspect of a broadcaster's livelihood—indeed, its very existence. In addition to the obvious adverse economic impact of large fines, the parties stipulated that "the loss of a license would be catastrophic for any broadcaster, and that a credible threat of a revocation proceeding can seriously impair a broadcaster's effort to raise capital." Stipulations of Fact P 29, *in* J.A. at 49.

The Commission's treatment of Infinity Broadcasting Corporation demonstrates the leverage the agency has over broadcasters, as well as its use of unreviewed indecency determinations to impose stiff monetary penalties. The Commission notified Infinity and one of its subsidiaries that it intended to levy a $200,000 forfeiture on each of three stations that broadcast the same allegedly indecent program. *Letter to Mr. Mel Karmazin, President, Sagittarius Broadcasting Corp.*, 8 F.C.C. Rcd 2688, 2689 (1992). It based this unusually large fine on "the apparent pattern of indecent broadcasting exhibited by Infinity over a substantial period since our initial indecency warning." *Id.* The Commission warned that any future failures to comply with its indecency regulations would produce additional sanctions, including possible revocation of Infinity's broadcast licenses. *Id.* at 2690. Commissioner Quello made this threat explicit: "We could, for example, say 'enough is enough' and set all, or some, of Infinity's licenses for hearing to determine whether Infinity

possesses the character to continue to hold them or whether they should be revoked. At this time—and I underline, *at this time*—I am not persuaded to take this step." *Id.* at 2691 (Quello, Comm'r, separate statement). Because of Infinity's alleged indecent programming, the Commission also seriously considered blocking its proposed acquisition of additional stations, but ultimately allowed the acquisition to go through at least in part, according to one Commissioner, because Infinity bowed to the Commission's threats and promised not to broadcast the program containing the allegedly indecent material on the newly acquired stations. *See Applications of Cook Inlet Radio License Partnership*, 8 F.C.C.Rcd 2714, 2721 (1992) (Quello, Comm'r, concurring). In a subsequent Notice of Apparent Liability to Infinity regarding material aired in a different segment of the same program, the Commission acknowledged the extent to which the licensee had caved in to Commission pressure, noting with approval its efforts to conform to the FCC's view of indecency by rigorously reviewing and modifying programs, as well as by instituting a multiple "delay" mechanism and requiring management-level personnel to monitor continuously the programs as they aired. *Letter to Mr. Mal Karmazin, Infinity Broadcasting Corp.*, 8 F.C.C.Rcd 6740, 6741 (1993). But again, the Commission warned that "any future infractions [of the indecency regulations] would place Infinity's continuing fitness as a Commission licensee in question." *Id.*

That broadcasters "attempt to conform their conduct to the indecency standards articulated by the FCC and its Commissioners, whether or not they believe that those standards are constitutional," Stipulations of Fact P 30, *in* J.A. at 50, is thus not surprising. As the Supreme Court recognized in *Bantam Books*, "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books*, 372 U.S. at 68, 83 S.Ct. at 638. According to the record in this case, that is exactly what broadcasters are doing: they "come around" in the face of economic and regulatory coercion, not necessarily because their broadcasts are indecent, but because they cannot get judicial

review of the Commission's indecency determinations. This manipulation of speech without judicial review is unconstitutional.

While I enthusiastically support the suggestion that the FCC and the Department of Justice speed things up, *see* Maj.Op. at 1262, I do not think this offers broadcasters much relief since it completely depends on the willingness of two different agencies to expedite their actions. Nor am I reassured by the suggestion that broadcasters are "free to prove up" their claims in an action for a declaratory judgment, *id.* at 1262, because the broadcasters, rather than the government, would then bear the burden of obtaining judicial review as well as the burden of proof. "Where the transcendent value of speech is involved," *Freedman*, 380 U.S. at 58, 85 S.Ct. at 739 (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)), the government must bear "the burden of instituting judicial proceedings, and of proving that the material is unprotected." *Conrad*, 420 U.S. at 560, 95 S.Ct. at 1247.

I would remand the case for the district court to establish procedures to facilitate prompt judicial review of forfeiture determinations. Properly designed, such procedures would not interfere with the Commission's implementation of its Congressional mandate to regulate indecency. Instead, they would ensure that the agency fulfill its responsibilities within constitutional boundaries.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACTION FOR CHILDRENS TELEVISION, *et al.*,
PLAINTIFFS,

v.

FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANT.

Civ. A. No. 93-0400 RCL

May 18, 1993.

LAMBERTH, District Judge.

This case comes before the court on plaintiffs' motion for a preliminary injunction, and plaintiffs' and defendant's cross-motions for summary judgment. For the reasons stated in this Memorandum Opinion, the court denies plaintiffs' motions for a preliminary injunction and summary judgment and grants defendant's motion for summary judgment.

I. FACTUAL BACKGROUND[1]

Plaintiffs are a group of broadcasters and interested listeners/viewers who challenge the procedure under which the Federal Communications Commission ("FCC") regulates indecent broadcasting. Plaintiffs contend that the FCC procedure fails to guarantee prompt judicial review of the forfeiture orders FCC issues against broadcasters it believes have broadcast indecent

[1] The parties have agreed to Stipulations of Fact ("SOF"), and the court relies upon these stipulations in its recitation of the facts in this case.

material. Plaintiffs contend that the First and Fifth Amendments require prompt review of such forfeiture orders.[2]

The FCC is an independent federal regulatory agency created by Congress to regulate interstate and foreign radio communications pursuant to the Communications Act of 1934, as amended, 47 U.S.C. §§ 51 *et seq*. The Communications Act gives the FCC the authority to take appropriate action when licensees, also known as broadcasters, broadcast "obscene, indecent, or profane" material in violation of 18 U.S.C. § 1464. *See* 47 U.S.C. §§ 312(a)(6) & 503(b)(1)(D).

Under the Communications Act, the FCC has the authority both to determine whether violations of section 1464 have occurred, *see, e.g.*, 47 U.S.C. 503(b)(1)(D), and to impose sanctions for such violations, ranging from forfeitures to short-term renewal of licenses to revocation of licenses. 47 U.S.C. §§ 312(a)(6), 312(b)(2), 503(b)(1)(D). The FCC also has delayed renewal of broadcast licenses and approval of transfer applications in order to investigate indecency complaints against broadcasters. SOF ¶ 9.

The FCC historically has adjudicated indecency forfeitures only under the procedures described in 47 U.S.C. § 503(b)(4). The Communications Act also authorizes the FCC to adjudicate indecency forfeitures in a hearing before an Administrative Law

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[2] Plaintiffs are: Action for Children's Television; the American Civil Liberties Union; the Association of Independent Television Stations, Inc.; Evergreen Media Corporation; EZ Communications, Inc.; Fox Broadcasting Company, Inc.; Fox Television Stations, Inc.; Greater Media, Inc.; Infinity Broadcasting Corporation; the Motion Picture Association of America, Inc.; the National Association of Broadcasters; the National Association of College Broadcasters; National Public Radio; People for the American Way; Post-Newsweek Stations, Inc.; the Public Broadcasting Service; the Radio-Television News Directors Association; Shamrock Broadcasting, Inc.; the Society of Professional Journalists; South Fork Broadcasting Corporation; and 20th Century Fox Film Corporation.

Judge pursuant to 47 U.S.C. § 503(b)(3), but the FCC has rarely if ever used this route. SOF ¶ 8.

When the FCC receives a complaint from a viewer or listener that a licensee has broadcast an indecent program, the FCC staff members examine the complaint to determine whether the broadcast in question might fall within the parameters of the FCC's indecency enforcement practice. Those parameters include whether the broadcast was presented between the hours of 6:00 a.m. and 8:00 p.m. and whether the broadcast contained indecent material, *i.e.* material that includes patently offensive descriptions of sexual or excretory activities or organs as measured by contemporary community standards for the broadcast medium. SOF ¶ 9. The FCC uses those parameters because of the considerable case law that has developed around indecent speech and its First Amendment protections. The court addresses this case law below. SOF ¶ 9.

After determining that an indecency complaint fall within these parameters, the FCC staff members in the Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau make a threshold recommendation whether to proceed with an investigation of the complaint. If the Mass Media Bureau, in consultation with the General Counsel's Office and/or the Commissioners' Assistants, decides that the complaint does not warrant investigation, the complaint is dismissed. If, on the other hand, a determination is made to investigate a complaint, FCC staff members will often send a Letter of Inquiry ("LOI") to the broadcaster named in the complaint. Because the complaining party typically does not serve the broadcaster with a copy of the complaint filed with the FCC, in most instances the LOI serves as the broadcaster's first notice that a complaint has been filed. The LOI is a request for additional information about the broadcasts in question and does not represent a final determination of an indecency violation. The staff uses LOIs in order to obtain information and afford licensees an opportunity to respond to allegations of violations prior to the decision on whether a violation occurred. SOF ¶ 10.

After the broadcaster responds to the LOI, the staff members must decide whether a violation has in fact occurred. If the staff members conclude that a violation has occurred, they send the broadcaster a Notice of Apparent Liability ("NAL").[3] The NAL acts as a "preliminary notice issued by the Commission, or by Bureaus/Offices under delegated authority, alleging the violation of the Commission's rules and requesting payment from the alleged violator." SOF Exh. 1, FCC Directive 1157.1, at 2. There is no formal evidentiary hearing on an NAL. The broadcaster's only recourse is to either pay the forfeiture or submit, usually within 30 days from the issuance of the NAL, an opposition to the NAL in which it can explain why a forfeiture should not be imposed or should be reduced. See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80. In addition, broadcasters or their attorneys often make oral and written presentations to the Commissioners and other FCC staff members in an effort to persuade the FCC not to issue a forfeiture order. The NAL does not represent a final determination of an indecency violation. SOF ¶ 11.

After reviewing a broadcaster's response (if any) to the NAL, the FCC decides whether a forfeiture is appropriate. Where the Commission has issued an NAL, and the broadcaster has not paid, the FCC has never declined to impose liability in its final decision. In making this determination, the FCC is requested to consider a number of factors, including "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." *See* 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4). In determining whether to increase the amount of a forfeiture because of a pattern of indecent broadcasting, the FCC has twice cited prior alleged indecent broadcasts that are the subject of contested and judicially unreviewed indecency forfeitures. *See,*

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[3] At oral argument, plaintiffs' counsel informed the court that the Commission itself must approve NALs that carry a penalty of greater than $20,000.

Notice of Apparent Liability to Evergreen Media Corp., FCC 93-97, at 4 & n. 5 (Feb. 25, 1993); *Notice of Apparent Liability to Sagittarius Broadcasting Corp.*, 71 Rad.Reg.2d (P & F) 989, 990 & n. 3 (1992). SOF ¶ 26.

After issuance of a forfeiture order by the Commission or the Mass Media Bureau, a broadcaster may petition for reconsideration of the order, seeking reduction or rescission of the forfeiture. If a forfeiture order is issued by the Mass Media Bureau, a broadcaster may file an application for review with the FCC, seeking reversal or modification of the Bureau's decision. The issuance of a forfeiture order by the Commission, or a Mass Media Bureau forfeiture order that the broadcaster has not appealed to the FCC, represents a final agency determination that the broadcaster has violated 18 U.S.C. § 1464. SOF ¶ 12.

Under 47 U.S.C. § 503(b)(6), the FCC may not impose a forfeiture penalty for a violation that occurred (1) more than one year prior to the date of issuance of the NAL or (2) prior to the date of commencement of the last term of license for which the broadcaster has been granted a license by the FCC, whichever is earlier. In addition, the FCC has internal guidelines for tracking and processing NALs. FCC Directive 1157.1, at 4, states that FCC staff members "are required to initiate forfeiture orders expeditiously, generally within 60 days after issuance of NALs . . . ." SOF ¶ 18.

In the FCC's experience, many broadcasters that have been assessed forfeitures for indecency violations have paid those forfeitures, either shortly after the issuance of an NAL or in compliance with a forfeiture order. If a broadcaster does not seek reconsideration or review of a forfeiture order, and fails to pay the forfeiture order within 60 days after issuance of the forfeiture order, and does not indicate in writing its intent not to pay, FCC staff members proceed to send three progressively stronger dunning letters at 30 day intervals in an effort to secure payment of the forfeiture. If a broadcaster still has not paid the forfeiture after receiving three dunning letters, or has indicated in writing its intent not to pay, the FCC refers the matter to the United

States Attorney for initiation of a collection action in United States District Court. FCC Directive 1157.1, at 4-5. To date, only two broadcasters have refused to pay forfeitures imposed for indecent broadcasts after the FCC has exhausted its dunning letter procedures. One other broadcaster indicated in writing its intent not to pay after receive one dunning letter. The FCC has asked the United States Attorney to initiate collection actions against all three broadcasters. SOF ¶ 20. Pursuant to 28 U.S.C. § 2462, the United States Attorney must file an action to collect a forfeiture imposed by the FCC within five years from the date when the claim first accrued.

Within this enforcement procedure is the potential for a greatly prolonged forfeiture process, a potential that plaintiffs claim the FCC has amply realized. In the past, the FCC has taken between 6 and 35 months to issue an NAL from the time of the initial complaint, with the average wait being 14 months. After issuing an NAL, the Commission has taken from 6 to 23 months to issue the final forfeiture order, with the average wait for the final order being 11 months.[4] Once a forfeiture order becomes final, a broadcaster could wait another period (but no longer than five years from when the claim accrued) before the United States Attorney files suit to enforce the order and thereby precipitate its judicial review.

There are few if any checks on the duration of a forfeiture proceeding. There is no statute or regulation that (1) imposes time limits on the FCC's processing of indecency complaints; (2) requires expedition in such processing; (3) imposes time limits on the United States Attorney's filing of forfeiture actions; or (4) requires expeditious filing of forfeiture actions. SOF ¶ 23. Once

[4] Plaintiffs' counsel supplied the court with these figures at oral argument, based on Exhibit 3 to the Stipulations of Fact. Exhibit 3 lists all of the indecency forfeiture proceedings since 1987 that have resulted in the issuance of LOIs and/or NALs. The chart tracks each proceeding from the date when the apparently indecent material aired to the date of the last activity in the proceeding.

a forfeiture action ultimately is filed in federal court, no statute requires the District Court to decide the action within a specified period of time, and there is no requirement of expedition. SOF ¶ 24. Plaintiffs contend that this scheme renders them powerless to speed the forfeiture order through the process and ensure its prompt judicial review.

Unlike obscenity, indecent speech is fully protected by the First Amendment. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). Nonetheless, the FCC constitutionally can restrict indecent broadcasting to certain times of the day. In *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50, 98 S.Ct. 3026, 3040-41, 57 L.Ed.2d 1073 (1978), the Supreme Court found that the government's interest in protecting unsupervised children from indecent broadcasting allowed the FCC to limit indecent broadcasts to those times of day when such an audience would be in low attendance.

Since *Pacifica*, there has been extensive litigation in this Circuit regarding the FCC's definition of both indecency and the "safe harbor" time period during which indecent programs can be broadcast. Of particular importance are two cases that the lead plaintiff in this case, *Action for Children's Television ("ACT")*, brought to the D.C. Circuit. *See generally* William Banks Wilhelm, Jr., Note, *In the Interest of Children: Action for Children's Television v. FCC—Improperly Delineating the Constitutional Limits of Broadcast Indecency Regulation*, 42 Cath.U.L.Rev. 215 (1992) (discussing *ACT I-III*).

In *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C.Cir.1988) (*"ACT I"*), the Circuit Court held that the FCC may regulate indecent broadcasting only to the extent necessary to protect unsupervised children, 852 F.2d at 1240, and that the FCC had not adequately justified its decision to restrict indecent broadcasting to between midnight and 6:00 a.m. 852 F.2d at 1340-44. After *ACT I*, Congress passed a law requiring the FCC to completely prohibit indecent broadcasting and eliminate any safe harbor at all. In *Action for Children's Television*, 932 F.2d

1504 (D.C.Cir.1991) ("*ACT II*"), the Court of Appeals invalidated that law and again instructed the FCC to "identify some reasonable period of time during which indecent material may be broadcast." 932 F.2d at 1509. The FCC still has not accomplished this and pursuant to another new federal statute; Pub.L. No. 102- 356, 106 Stat. 949, 954 (1992); has limited the safe harbor to between midnight and 6:00 a.m. *See Report and Order in the Matter of Enforcement Against Broadcast Indecency in 18 U.S.C. § 1464*, FCC 93042 (adopted Jan. 19, 1993). Now *ACT III* is pending in the Court of Appeals. In *ACT III*, No. 93-1092 (filed Jan. 27, 1993), Action for Children's Television argues among other things that the safe harbor is unconstitutionally narrow. The D.C. Circuit has stayed FCC's enforcement of the midnight to 6:00 a.m. safe harbor pending oral argument, which is set for September 13, 1993. Because of the stay, the FCC has been enforcing an 8:00 p.m. to 6:00 a.m. safe harbor. SOF ¶ 9. None of the issues raised in these cases are before the court now. These cases simply put plaintiffs' claim in a legal context.

Plaintiffs bring two claims, both of which arise out of the pace of the forfeiture process. First, plaintiffs claim that the forfeiture process violates the First and Fifth Amendments because it constitutes a system of censorship without prompt judicial review. Plaintiffs contend that the forfeiture scheme causes self-censorship because of two pre-existing factors present in the FCC regulatory scheme.

The first factor is that the FCC frequently uses forfeiture orders to announce new indecency standards the FCC expects all broadcasters to follow, and threatens them with sanctions should they refuse to comply. *See, e.g., Notice of Apparent Liability to Sagittarius Broadcasting Corp.*, 71 Rad.Reg.2d (P & F) 989 (1992); *In re Applications of Cook Inlet Radio License et al. for Assignment*, 71 Rad.Reg.2d (P & F) 992 (1992).

The second factor involves the actions of the FCC Commissioners. According to plaintiffs, the FCC Commissioners use the unreviewed NALs as binding standards and make public

statements to the effect that all broadcasters must follow these standards or risk adverse FCC action. Plaintiffs present evidence that the FCC Commissioners use their positions as a bully pulpit to condemn broadcasters who are involved in the forfeiture proceedings because of allegedly indecent broadcasts and to urge all other broadcasters to avoid such sanctionable behavior. SOF ¶ 13 & Exh. 2. Through these statements, the Commissioners like to think of themselves as simply providing "guidance" to broadcasters, although they also threaten "adverse FCC action" if broadcasters should refuse to comply. SOF ¶ 14.

Plaintiffs contend that the combination of these two factors causes broadcasters to self-censor because they have no hope of getting prompt judicial review of an indecency forfeiture order. According to plaintiffs, broadcasters would rather censor their own broadcasts than risk the wrath of the FCC and its Commissioners, who have "warned that broadcasters who engage in indecent broadcasting contrary to FCC indecency rulings might be subjected to various sanctions, including forfeiture penalties; denial or delay of applications to renew, acquire or transfer broadcast licenses; short-term renewal of broadcast licenses; or revocation of broadcast licenses." SOF at ¶ 27. Plaintiffs contend broadcasters must self-censor to avoid such prospects when they have no hope of prompt judicial review. This alleged self-censorship and chilling of the broadcasters' First Amendment rights leads plaintiffs to contend that the forfeiture procedure violates the Constitution. Specifically, plaintiffs claim that 47 U.S.C. §§ 503(b)(3) and (4), which outline the forfeiture procedure, are unconstitutional.

Plaintiffs also raise a second, related claim. Plaintiffs' second claim is a statutory claim and not a constitutional one. 47 U.S.C. § 504(c) provides that "[i]n any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has

become final." Plaintiffs contend that the FCC has violated this provision by relying "upon contested and judicially unreviewed indecency forfeiture orders to punish or threaten broadcasters with increased forfeiture penalties, revocation or non-renewal of broadcast licenses, and delayed or denied processing of various assignment or transfer applications." Complaint ¶ 56.

Plaintiffs filed for a preliminary injunction when they filed their Complaint. Plaintiffs and defendant then agreed to file cross-motions for summary judgment and consolidate plaintiffs' application for a preliminary injunction with a hearing on the merits of plaintiffs' complaint.[5] The parties also stipulated to all facts relevant to this dispute in lieu of discovery. The court appreciates the responsible way counsel developed the factual record herein, allowing the court to focus its energies on the difficult legal issues presented. Counsel have also very ably assisted the court with superb legal briefs and oral arguments. Counsel for both sides set an example worth emulation.

The court now will address the parties' cross-motions for summary judgment. Because both motions raise the same issues, the court will consider the two motions simultaneously. The court will not reach plaintiffs' motion for a preliminary injunction because the court's decision on the summary judgment issues renders that motion moot.

II. DISCUSSION

As noted above, plaintiffs and defendants have stipulated to the facts relevant to this matter, so no disputes as to the facts exist. Accordingly, the court will grant summary judgment in favor of either party only if either party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Before reaching the merits of plaintiffs' claims, however, the court must address its jurisdiction

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[5] Defendant filed a motion to dismiss, or, in the alternative, for summary judgment. The FCC did so because it challenges this court's jurisdiction over this matter as well as the plaintiffs' standing to bring these claims.

over this matter as well as plaintiffs' standing to bring this suit. The FCC has raised both of these issues, and the court must resolve them before moving on to the merits.

A. Jurisdiction

In its motion to dismiss, or, in the alternative for summary judgment, the FCC challenges this court's subject matter jurisdiction over both of plaintiffs' claims. The maze of jurisdictional rules governing the review of FCC matters is difficult to navigate, but the court concludes that plaintiffs have done so successfully on their constitutional claim.

The doctrine of primary jurisdiction requires a party who wishes to challenge an FCC policy or practice to first do so through a motion for a declaratory ruling with the Commission itself. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 n. 5, 104 S.Ct. 1936, 1939 n. 5, 80 L.Ed.2d 480 (1984); *Writers Guild of America, West v. American Broadcasting Co.*, 609 F.2d 355, 363-66 (9th Cir.1979), *cert. denied*, 449 U.S. 824, 101 S.Ct. 85, 66 L.Ed.2d 27 (1980). The Communications Act then gives the Courts of Appeals exclusive jurisdiction to review the FCC's declaratory rulings in those cases, as well as all policies, practices, and regulations adopted by the Commission. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *see ITT*, 466 U.S. at 468, 104 S.Ct. at 1939. The Courts of Appeal also have exclusive jurisdiction over any suit seeking relief that might affect the Circuit Courts' future jurisdiction under the Communications Act. *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75-79 (D.C.Cir.1984).

These jurisdictional doctrines do limit a District Court's jurisdiction over FCC matters, but a sliver of the jurisdictional pie still remains on the District Court's plate. As already discussed, the District Court has jurisdiction over forfeiture enforcement actions brought by the U.S. Attorney on behalf of the FCC. 47 U.S.C. § 504(a). *See also Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1540 (2d Cir.1991), *cert. denied*, __ U.S. __, 112 S.Ct. 966, 117 L.Ed.2d 132 (1992). More importantly, the District Court retains jurisdiction over facial

challenges to the constitutionality of a statute, 28 U.S.C. § 1331, even if that statute relates to an FCC matter.[6]

Plaintiffs' first claim challenges the facial validity of the forfeiture provisions of the Communications Act of 1934. The FCC contends that plaintiffs' claim is really an attack on the FCC's method of enforcing its broadcast indecency policies, a challenge that only the Court of Appeals could hear. The court disagrees with this construction of plaintiffs' first claim.

Plaintiffs go to great lengths to lay a factual context for their challenge to the forfeiture provisions. Plaintiffs explain the FCC's use of NALs to state new indecency standards and the FCC Commissioners' use of public speeches to browbeat broadcasters into submission. These foundational facts do not transform plaintiffs' claim into one challenging these practices. Plaintiffs' claim remains a challenge only to the facial validity of the forfeiture provisions. The background plaintiffs supply regarding these practices only allows the court to determine whether the forfeiture provisions are facially unconstitutional given the universe of circumstances under which broadcasters must operate. *Cf. Sable Communications v. FCC*, 492 U.S. 115, 128-29, 109 S.Ct. 2829, 2837-38, 106 L.Ed.2d 93 (1989) (ban on commercial telephone indecency unconstitutional because no facts in record demonstrated ban was necessary to protect unsupervised children); *Carlin Communications v. FCC*, 749 F.2d 113, 121 (2d Cir.1984) (similar ban unconstitutional because record did not demonstrate why prohibition needed during daytime school hours).

The FCC alternatively argues that plaintiffs' facial challenge rests on the premise that the forfeiture provisions have the effect of creating an informal censorship scheme. The FCC continues

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[6] *TRAC* did not disturb this court's jurisdiction over facial challenges to statutes governing FCC operations. *Ticor Title Ins. v. FTC*, 814 F.2d 731, 843 (D.C.Cir.1987) (Opinion of Edwards, J.) ("*TRAC* itself did not raise this situation. . . ."); *Time Warner Entertainment Co. v. FCC*, 810 F.Supp. 1302, 1304 (D.D.C.1992).

that if the forfeiture scheme allows the FCC to censor broadcasters, the FCC does so in violation of 47 U.S.C. § 326, which prohibits the Commission from engaging in censorship. The FCC contends, therefore, that plaintiffs' claim of censorship is a claim that the FCC is acting *ultra vires*, in violation of section 326, and that under the doctrine of primary jurisdiction plaintiffs must first bring this claim to the FCC.

The censorship that section 326 prohibits and the censorship at issue here are quite different. *In FCC v. Pacifica Foundation*, 438 U.S. 726, 737, 98 S.Ct. 3026, 3034, 57 L.Ed.2d 1073 (1978), the Supreme Court held that the "subsequent review of program content is not the sort of censorship at which [section 326] was directed." The Court read section 326 narrowly, to encompass little if anything more than "'the sort of censorship which went on in the seventeenth century in England.'" *Id.* at 736 n. 9, 98 S.Ct. at 3033 n. 9, quoting 2 Z. Chafee, *Government and Mass Communications* 641 (1947). The censorship involved here is self-censorship and not the prior review or censorship prohibited by section 326. Plaintiffs base their claim against the FCC based on First Amendment case law, not section 326, so they need not bring this claim to the FCC first. The court concludes that it has jurisdiction over plaintiffs' first claim.

This court's jurisdiction over plaintiffs' second claim is more problematic. In their statutory claim, plaintiffs contend that the FCC violates section 504(c) of the Communications Act by relying on unadjudicated forfeiture orders to increase penalties in later proceedings against the same broadcasters. The court concludes that it does not have jurisdiction over this claim.

This court only has jurisdiction over an FCC matter if that matter involves the review of a forfeiture order or a challenge to the facial validity of a statute. That is not the case here, and plaintiffs offer no other basis for concluding that this claim falls within this court's sliver of jurisdiction over FCC matters.

This claim attacks an FCC policy or practice and is subject to the doctrine of primary jurisdiction. *See Writers Guild*, 609 F.2d

at 363-66. Plaintiffs concede this but argue that the court should not apply the primary jurisdiction doctrine because the purposes of this doctrine would not be met by doing so.

Plaintiffs argue that courts only rely on primary jurisdiction when the expert and specialized knowledge of the agency is necessary to resolve the dispute. Plaintiffs contend that the resolution of their second claim does not require agency expertise and is within the conventional competence of the courts.[7] The court disagrees. Whether or not FCC practice violates section 504(c) is an issue that the FCC should "have the first crack at." *Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 121 (7th Cir.1982). The FCC has special expertise in determining whether it has violated the statute that governs its conduct. This court will not initially preempt the FCC's opportunity to demonstrate its expertise when such a specialized issue is involved.

Plaintiffs alternatively contend that this court should retain jurisdiction because any request to the FCC for a declaratory ruling would be futile. They contend that the FCC will be biased on this issue because it raises the question of whether the FCC complies with a statute that restricts its own authority. The case plaintiffs cite for this proposition, *Peoria v. General Elec. Cablevision Corp.*, *supra*, does not state that futility defeats primary jurisdiction. There the Seventh Circuit chastised a party for even attempting to justify on futility grounds its end-run around the FCC and procession straight to court. 690 F.2d at

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[7] For this position, plaintiffs rely on *Nader v. Allegheny Airlines*, 426 U.S. 290, 305, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643 (1976). In that case, Ralph Nader sued Allegheny Airlines for misrepresentation when he was "bumped" from a flight for which he had a ticket. The Supreme Court concluded that the misrepresentation claim did not have to be brought first to the FAA under the doctrine of primary jurisdiction because the resolution of that claim did not require agency expertise and was within the conventional competence of the courts. A misrepresentation claim is quite different from a claim that an agency is violating its own enabling statute.

121. Peoria concluded, however, that even if referral of the issue to the FCC would have been futile, the party should have done so anyway because the FCC's "response could [have been] of great assistance to the court" that ultimately might review the FCC ruling at issue. *Id.* at 122.

Because plaintiffs' second claim is of such importance to the FCC, as the futility argument itself demonstrates, this court finds that the FCC alone has jurisdiction over this claim at this time. The FCC should review this issue before the judicial branch becomes involved. Once the FCC has done so, the Court of Appeals will be able to fully understand the FCC's reasoning and determine the validity of plaintiffs' claim. Accordingly, the court grants the FCC's motion to dismiss plaintiffs' second claim and count III of plaintiffs' complaint.

B. Case And Controversy

The FCC next attacks the ability of these plaintiffs to bring their remaining constitutional claim. The FCC makes this argument in two ways. First the FCC challenges the standing of all but three plaintiffs. Then the FCC contends that the three remaining plaintiffs cannot bring the constitutional claim to this court either because that claim is not ripe or because interests of comity prevent this court from reviewing it. The court will address each of the FCC's arguments in turn.

1. STANDING

The FCC first challenges the standing of the non-broadcasting, viewer/listener plaintiffs. The FCC contends that three of the plaintiffs, Action for Children's Television (ACT), the American Civil Liberties Union (ACLU), and People for the American Way, lack standing because they represent the interest of listeners and viewers, i.e., the public, as opposed to broadcasters. The FCC relies on *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C.Cir.1975) for this position. The court finds *Illinois Citizens* dispositive and concludes the listener and viewer plaintiffs lack standing to bring the constitutional claim.

In *Illinois Citizens*, the Illinois Citizens Committee for Broadcast challenged the FCC issuance of a particular indecency forfeiture order as well as the procedure the FCC used to issue that order. The D.C. Circuit concluded that the Committee had standing to challenge the merits of the forfeiture order but not the procedure used to arrive at that order. 515 F.2d at 402-03. The court specifically determined that the forfeiture procedures could not be "asserted by the public as procedural error." *Id.* at 403.

Plaintiffs respond by relying on the general rhetoric of the Supreme Court regarding the public's interest in First Amendment broadcasting issues. Plaintiffs state that in cases like *Metro Broadcasting v. FCC*, 497 U.S. 547, 567, 110 S.Ct. 2997, 3010, 111 L.Ed.2d 445 (1990), and *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969), the Supreme Court has recognized those interests and that those interests give them standing. Those cases, however, discussed the interests of viewers and listeners to justify the regulation of broadcasters, not challenges to those regulations. Those cases do not support plaintiffs' position that any citizen can challenge any FCC regulation simply because of the public's interest in broadcast concerns. Even if plaintiffs' position is correct, this court respectfully concludes that it must follow the more specific precedent on the subject. That precedent is *Illinois Citizens* and that case requires the conclusion that ACT, the ACLU, and People for the American Way lack standing to bring a constitutional challenge to the FCC forfeiture procedure. Accordingly, the court grants the FCC's motion to dismiss these plaintiffs from the case.

The FCC's second standing challenge centers on the broadcasting plaintiffs that have not been involved in a forfeiture proceeding.[8] The FCC contends that these plaintiffs do not have

[8] These plaintiffs are: Association of Independent Television Stations, Inc.; EZ Communications, Inc.; Fox Broadcasting Company, Inc.; Fox Television Stations, Inc.; the Motion Picture Association of America, Inc.; the National Association of Broadcasters; the National

standing because they have suffered no injury from the forfeiture procedures under challenge. The plaintiffs counter that while they have never been the subject of a forfeiture order, the forfeiture orders imposed on other broadcasters have chilled these plaintiffs' exercise of their First Amendment rights. Plaintiffs contend that the chill they have suffered creates a sufficient injury to support their standing to bring this action. As long as plaintiffs prove they have been chilled, plaintiffs continue, they may remain in the case. The court disagrees and concludes that these plaintiffs have no standing and must be dismissed.

To have standing to bring a claim, a party "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). The D.C. Circuit has concluded that the chilling effect of certain laws on a parties' First Amendment freedoms does not meet this standard. In *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C.Cir.1984), the Circuit stated that "'[a]llegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm,'" quoting *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-2326, 33 L.Ed.2d 154 (1972). The chilling effect of a law supplies only the reason why that law is invalid and not the harm which entitles the plaintiff to challenge it. *United Presbyterian*, 738 F.2d at 1378. Even if plaintiffs did prove that they had been chilled by this statute then, they would not have standing under the case law of this circuit.

Plaintiffs contend that they still could have standing if they feared the imminent imposition of a forfeiture order. Plaintiffs rely on *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209,

Association of College Broadcasters; National Public Radio; Post-Newsweek Stations; Public Broadcasting Service; the Radio-Television News Directors Association; Shamrock Broadcasting, Inc.; the Society of Professional Journalists; South Fork Broadcasting Corporation; and 20th Century Fox Film Corporation.

1215, 39 L.Ed.2d 505 (1974) for this position. In that case, the police had warned the individual in question twice to stop his handbilling and had told him that if he tried again he would be prosecuted. Because there was such a clear possibility of prosecution, the Supreme Court held in that "in these circumstances " the handbiller had standing even though he had not been prosecuted. *Id.*

Those circumstances do not exist here. These plaintiffs have not been threatened with forfeiture proceedings. Plaintiffs contend that they have conformed their conduct out of fear of forfeiture orders, SOF ¶ 30, but that assertion is unsubstantiated by the record and wholly speculative. The future harm posed to plaintiffs by the forfeiture procedures is too "conjectural [and] hypothetical," and not "distinct and palpable, concrete, direct, . . . real and immediate" enough to give these plaintiffs standing. See *United Presbyterian*, 738 F.2d at 1378.

Plaintiffs also rely on *Clements v. Fashing*, 457 U.S. 957, 962, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508 (1982) for this position. There again the Supreme Court found standing because of the specific circumstances of the case. The original plaintiffs were public officials who could not run for another office because once they declared their candidacy, a state statute provided for those officials' automatic resignation from their current position. The Court found standing for two reasons. First, the Court found that the plaintiffs' claims that they would run for office but for the statute were *uncontested*. Second, the Court found that the statute in question provided for the *automatic* resignation of the plaintiffs, by operation of law, once they declared their candidacy. For these two reasons, the Court found the feared injury was not speculative. Here, the FCC does contest plaintiffs' allegations that they conform their conduct to avoid indecency forfeitures, and the court agrees that those allegations are speculative. Here also the initiation of forfeiture proceedings would not be automatic should these plaintiffs violate the indecency regulations. The FCC would have to receive a complaint and the program would have to be reviewed by the FCC staff first. Those safeguards and the contested nature of the

plaintiffs' claims distinguish this case from Clements. The court grants the FCC's motion to dismiss these plaintiffs for lack of standing.

2. RIPENESS AND COMITY

The FCC's last challenge is directed at the remaining three plaintiffs: Infinity Broadcasting Corporation; Greater Media, Inc.; and Evergreen Media Corporation. The FCC contends that the constitutional claim is not ripe for Infinity and Greater Media, and that in the interests of judicial comity the court should not review the claim as brought by Evergreen. The court concludes that Infinity Broadcasting has standing but that Greater Media does not and that comity prevents its review of Evergreen Media's claim.

The FCC concedes that Infinity and Greater Media have standing. They both are involved in current forfeiture proceedings, and that involvement creates a present injury for standing purposes. FCC's contention is that Infinity and Greater Media's constitutional claim is not ripe until those forfeiture proceedings become final. Because Infinity and Greater Media's claim centers on the delays involved in the imposition of forfeiture orders, the FCC contends that the two broadcasters cannot bring that claim until two events occur: (1) the FCC imposes a forfeiture at the end of the proceedings now underway, and (2) Infinity and Greater Media suffer injury because of the length of the forfeiture proceeding and any subsequent enforcement actions. Infinity and Greater Media counter that they are making a facial challenge to the forfeiture statute, and that such a claim is ripe before the FCC completes the forfeiture proceedings.

In determining whether an issue is ripe for judicial review, this court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Plaintiffs' facial challenge does not necessarily satisfy these two factors. Under *Media Access Project v. FCC*, 883 F.2d 1063, 1070

(D.C.Cir.1989), because the FCC has discretion in its application of the forfeiture procedure, plaintiffs' purely facial challenge still may not be ripe for review if the FCC could either decide not to impose a forfeiture or do so expeditiously.

In *Media Access Project*, a group of non-profit organizations challenged an FCC regulation that governed the waiver of fees for FOIA requests. 883 F.2d at 1064. The non-profit organizations challenged the facial validity of the regulation by arguing that it was arbitrary and capricious. *Id.* at 1070. The Circuit Court concluded that the challenge was not ripe because it was not clear that the FCC would apply the statute to the detriment of those organizations. Of particular importance in that case was the FCC's representation that the statute would not be so applied. *Id.* The Circuit Court postponed its consideration of the issue until such a detrimental application made the issue ripe for review.

The reasoning of *Media Access Project* controls five out of the six forfeiture proceedings underway between these two plaintiffs. The FCC has instituted three indecency forfeiture proceedings against Greater Media, all for the same radio station, KLSX-FM. In two, the FCC has issued an LOI and Greater Media has responded. In the third, the FCC has issued an NAL and Greater Media has responded. The FCC has initiated all three procedures since July of 1992 and none of them are final yet. SOF Exh. 3.

Two of Infinity's three forfeiture proceedings also are far from final resolution. In one the FCC issued an NAL in December of 1992 and Infinity responded in February of this year. In the second, the FCC issued an LOI in August of 1992 and Infinity responded in October. No further action has been taken in either of these proceedings. SOF Exh. 3.[9]

[9] Evergreen also is involved in two forfeiture proceedings that are not yet concluded. The constitutional claim is not ripe as to Evergreen based on these two proceedings for the same reasons it is not ripe as to Greater Media and Infinity.

None of these five proceedings create a ripe claim for these two plaintiffs. "In light of the Commission's discretion in the application of its [indecency and forfeiture] regulations . . . [the court concludes] the Commission should at least be given the first opportunity to apply its regulations to [plaintiffs]." *Media Access Project*, 883 F.2d at 1070. "[P]ostponing review would provide for a more efficient examination and disposition of the issues." *State Farm Mutual Insurance Co. v. Dole*, 802 F.2d 474, 479 (D.C.Cir.1986).[10]

This is not true, however, for Infinity's last forfeiture proceeding still in progress. In that proceeding, the FCC issued an NAL on November 29, 1990 and issued a forfeiture order on October 23, 1992. Since that time, Infinity has filed a motion for reconsideration, which is still pending. Unlike *Media Access Project*, the FCC at least initially has signaled its willingness to apply its forfeiture regulations to the detriment of Infinity. The FCC already has imposed a final forfeiture order, and while Infinity has moved for reconsideration of that order, the court finds that the FCC's initial action significant enough to make Infinity's constitutional claim ripe for review.

Infinity has waited two years for this forfeiture proceeding to conclude and, at least so far, the FCC has chosen to impose an indecency forfeiture. There is no need for further factual development. Infinity's claim that the FCC's forfeiture procedure fails to ensure prompt judicial review is ripe, now that a forfeiture has been imposed and Infinity has waited over two years for a court date. The court concludes that only Infinity's constitutional claim is ripe and dismisses plaintiff Greater Media.

The FCC's last challenge is to Evergreen's ability to bring its constitutional claim in this court. The FCC does not challenge

[10] The court also finds no undue hardship in postponing review. These cases have been pending less than a year, and the mere potential for injury from delay or forfeiture imposition is insufficient to render an issue ripe for review. *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1217 (D.C.Cir.1984).

Evergreen's standing. The FCC instead contends that this court should not allow Evergreen to continue as a plaintiff because of its involvement in a similar case in another jurisdiction.

Evergreen currently is a party to a forfeiture action in the District Court for the Northern District of Illinois. *United States v. Evergreen Media Corp.*, No. 92-CV-05600 (N.D.Ill. filed Aug. 19, 1992); SOF ¶ 21. Evergreen's challenge to the indecency forfeiture at issue in that case is closely related to the constitutional claim at issue here and could be raised in that litigation. 47 U.S.C. § 504(a); SOF ¶ 25. Considerations of comity preclude this court from resolving that claim when the same claimant could raise it simultaneously in front of another court of equal authority. *Washington Met. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C.Cir.1980). This is especially true here because the Illinois matter was filed before this one and should be allowed to proceed to its conclusion first. *Id.* The court concludes that considerations of comity preclude it from allowing Evergreen to continue as a plaintiff. The court grants the FCC's motion to dismiss Evergreen as a plaintiff.

C. The Merits

The remaining plaintiff, Infinity Broadcasting Corporation, challenges the constitutionality of 47 U.S.C. § 503(b)(4).[11] As already discussed, section 503(b)(4) provides the procedure the FCC uses to impose indecency forfeitures on broadcasters. Infinity contends that that provision is facially invalid because it creates a system of prior restraint and censorship without providing for prompt judicial review of those censorship decisions.

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[11] Plaintiff also challenges section 503(b)(3), but as already mentioned, the FCC rarely if ever has used the 503(b)(3) procedure to adjudicate forfeitures. The court does not address the appropriateness of plaintiffs attack on section 503(b)(3) because the court denies plaintiff's motion for summary judgment and grants that of the FCC.

Infinity faces a "heavy burden" in seeking to have section 503(b)(4) declared unconstitutional. *Rust v. Sullivan*, __ U.S. __, _ _, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991). This is even more true here because Infinity is challenging the facial validity of this provision.

> A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be invalid. The fact that the [ ] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render the Act wholly invalid . . . .

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). The court concludes that Infinity has not met this high standard.[12]

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[12] The court initially reaches this conclusion initially because plaintiff has not demonstrated that there are no circumstances under which sections 503(b)(3) and (4) could function constitutionally. Sections 503(b)(3) and (4) provide the procedure for the imposition of all FCC forfeitures, not just those relating to indecent broadcasts. 47 U.S.C. § 503(b)(1) states that:

> Any person who is determined by the Commission, in accordance with [sections 503(b)(3) and (4)], to have– (A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission; (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States; (C) violated any provision of section 317(c) or 509(a) of this title; or (D) violated any provision of section 1304, 1343, or 1464 of Title 18; shall be liable to the United States for a forfeiture penalty.

Plaintiff's arguments, even if valid, only go to the imposition of forfeitures regarding indecent broadcasts. While neither the FCC nor plaintiff addressed this argument, the court concludes that the broad

Infinity bases its First Amendment claim almost exclusively on the Supreme Court case of *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). *Bantam Books* was set in Rhode Island and involved a clash between the Rhode Island Commission to Encourage Morality in Youth and some local book merchants. The Rhode Island Legislature created the Commission and gave it the duty to investigate and recommend the prosecution of any purveyor of obscene publications.[13] 372 U.S. at 59-60, 83 S.Ct. at 633-634. In practice, the Commission would send a letter to the targeted merchant notifying it that certain designated books or magazines had been declared objectionable for sale, distribution, or display to youths under 18 years of age. *Id.* at 61, 83 S.Ct. at 634. Those notices also would thank the business in advance for its cooperation, remind it that the Commission had a duty to recommend to the Attorney General those cases in need of prosecution, and inform the business that the list of objectionable publications had been sent to all local police departments. *Id.* at 63, 83 S.Ct. at 635. A police offer would usually visit the business a short time after its receipt of the notice to learn of any action taken. The merchant that brought the action provided evidence to the court that it once it received such a notice it would recall any publications listed and comply with the notice "'rather than face the possibility of some sort of a court action.'" *Id.* The lower court found as fact that the Commission's actions were "'clearly to intimidate'" the wholesalers, booksellers, and distributors, and that the Commission's activities "'resulted in the suppression of the sale and circulation of the book listed in said notices.'" *Id.*, at 63-64, 83 S.Ct. at 635-636.

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applicability of the forfeiture provisions would independently defeat Infinity's facial challenge.

[13] The enabling statute also gave the Commission the power to outlaw indecent publications, but the Supreme Court in its opinion focused only on the obscenity clause.

The Supreme Court held that the Commission's enabling statute was facially invalid and unconstitutional as violative of the First Amendment. The Court emphasized that the regulation of obscene publications requires "the most rigorous procedural safeguards" *id.* at 66, 83 S.Ct. at 637, but found that such safeguards were not present to keep the Commission at bay. The Court recognized that the Commission did not have the power to actually seize any books, but found a First Amendment violation anyway because the Commission's coercive powers had achieved the same result through more informal channels. *Id.* at 68-69, 83 S.Ct. at 638-639. Without any procedural safeguards to protect the plaintiffs from the Commission's coercion, the Supreme Court concluded that the Rhode Island scheme was a *de facto* system of prior restraint and informal censorship that violated the First Amendment. *Id.* at 70-71, 83 S.Ct. at 639-640.

Infinity tries to build its First Amendment claim by drawing comparisons between the FCC forfeiture scheme and that held unconstitutional in *Bantam Books*. Infinity contends that the FCC too is guilty of using a statutory scheme to censor. Infinity argues that a system of prior restraint now exists for broadcasters through the FCC's use of NALs to create new indecency standards and subsequent penalization of broadcasters who fail to comply with those standards. The FCC censors through intimidation, Infinity contends, and the broadcasters have no choice but to accede if they wish to retain their licenses and livelihood. Infinity believes that the FCC's use of NALs to set standards and deter future programming is unconstitutional because the forfeiture scheme does not provide for prompt review of those NALs. Infinity reasons that just as *Bantam Books* turned on the dearth of procedural safeguards protecting the Rhode Island merchants, so does this case turn on the lack of procedural safeguards protecting broadcasters. The court recognizes that there are some similarities between this matter and *Bantam Books*, but the court finds the distinctions between the two more compelling.

The first and most significant distinction is that between the mediums of expression at issue in these two cases. In *Bantam*

Books, the Rhode Island Commission was regulating publications, a medium of expression that historically has suffered from few restrictions. That is not the case with the broadcast medium, which is at issue in this case.

The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems . . . And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748, 98 S.Ct. at 3039-3040 (citation omitted). Broadcasts receive limited First Amendment protection as compared to publications, for example, because broadcast frequencies are a limited public resource. The scarcity of that resource requires that the government ensure its use is in the public interest. *See Pacifica*, 438 U.S. at 731 n. 2, 98 S.Ct. at 3031 n. 2. The government does so through regulation.

The need for broadcast regulation becomes particularly acute when the broadcast involved includes indecent speech. There are two reasons for this. The first is that the broadcast medium has a "uniquely pervasive" presence in the American home. *Id.* at 748, 98 S.Ct. at 3040. The FCC has the power to heavily regulate indecent broadcasts to ensure that those who wish to avoid indecent broadcasts may do so without having to leave their home or turn off the television and radio. The second reason is that broadcasting is "uniquely accessible to children, even those too young to read." *Id.* at 749, 98 S.Ct. at 3040. The government's established interest in the "well-being of its children," *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968), coupled with the ease of access that children have to broadcasts amply justify the FCC's regulation of this otherwise protected speech. *Id.* 438 U.S. at 749-50, 98 S.Ct. at 3040-41. Based on this last factor, the Pacifica Court itself contrasted the government's limited power to regulate indecent publications, as in *Bantam Books*, with its extensive power to regulate indecent broadcasts. *Id.* at 749, 98 S.Ct. at 3040.

Infinity does not address this issue. Infinity apparently assumes that broadcasts enjoy complete First Amendment protection with all its appointments. Contrary to plaintiff's assumption, there is no identity of First Amendment protection across mediums of expression, especially when the medium involved is one that the Supreme Court places at the bottom of the protection spectrum. Plaintiff's argument for the wholesale application of the *Bantam Books* reasoning overlooks this distinction. This court will not extend the *Bantam Books* ruling to a medium of expression that is so much more limited in the First Amendment protection it receives.

The second distinction consists in the differences between the scheme at issue in *Bantam Books* and that at issue here. The Supreme Court labeled the Rhode Island system one of prior restraint for four independent and particular reasons. *See id.* 372 U.S. at 71, 83 S.Ct. at 639. None of those reasons are present here, and the court will not apply *Bantam Books* to this matter in their absence.

First, the scheme in *Bantam Books* had no provision for judicial review of the Commission's decisions. *Id.* at 71, 83 S.Ct. at 639. Judicial review could have occurred only if the Commission recommended a merchant for criminal prosecution and if charges were then filed. Plaintiff contends that the same is true here: judicial review can occur only if the FCC refers a forfeiture order to the Department of Justice which then has to initiate an enforcement procedure. The difference is that in *Bantam Books*, Rhode Island never initiated any criminal prosecutions and did not seem to intend to. In *Bantam Books* there was a very real possibility that a court would never get a chance to review the Commission's orders. Here, there is already one enforcement proceeding before a district court, *United States v. Evergreen Media Corp.*, No. 92-cv-05600 (N.D.Ill. filed Aug. 19, 1992); SOF ¶ 21, two more cases have been referred to the Department of Justice for prosecution, SOF ¶ 20, and there is no evidence in the record that the FCC is trying to avoid judicial review of its indecency forfeiture orders.

The second factor contributing to the *Bantam Books* holding was that scheme's failure to provide the merchant with notice that its publications would be listed as objectionable. 372 U.S. at 71, 83 S.Ct. at 639. That same failure does not afflict the FCC forfeiture scheme. The FCC routinely sends the targeted broadcaster both an LOI and an NAL, and after its receipt of each the broadcaster has an opportunity to represent its position to the FCC. SOF ¶¶ 10-11. The broadcaster and its attorneys also frequently make supplemental written and oral presentations to the Commissioners and other FCC staff members in an effort to persuade the FCC not to issue a forfeiture order. SOF ¶ 11.

The third factor leading to the *Bantam Books* holding was the Rhode Island Commission's failure to explain its categorization of books as obscene or objectionable. 372 U.S. at 71, 83 S.Ct. at 639. This scheme does not share that failing either. Here, the D.C. Circuit already has upheld the FCC's definition of indecent broadcasting, *see supra* p. 6, against overbreadth and vagueness challenges. *ACT I*, 852 F.2d at 1335-40; *ACT II*, 932 F.2d at 1508. The same could not be said of Rhode Island's definition of obscenity. *Bantam Books*, 372 U.S. at 64, 83 S.Ct. at 636. Here, the FCC also must explain why the subject broadcast was indecent before issuing a forfeiture order. 47 U.S.C. § 503(b)(4). No such requirement existed in Rhode Island.

The final factor weighing in against the Rhode Island scheme was that scheme's success at complete suppression of the targeted publications. In *Bantam Books*, the Commission's actions resulted in the complete suppression of the targeted publications. *Bantam Books*, 372 U.S. at 63, 64, 67-68, 71, 83 S.Ct. at 635, 636, 637-638, 639. Unlike the Rhode Island scheme, the FCC's supposed system of informal censorship does not completely ban indecent broadcasts. By its own terms, this scheme allows the broadcast of indecent speech during particular times of the day. As already discussed, the FCC only bans the broadcast of indecent material outside of the "safe harbor" period. Licensees are free to broadcast indecent material at any time between 8:00 p.m. and 6:00 a.m. SOF ¶ 9. Before the FCC even begins investigating an indecency complaint, its staff first determines

whether the broadcast aired outside of that safe harbor. SOF ¶ 9. Any "chill" the plaintiff may feel from forfeiture scheme disappears with the daylight.

Infinity is free from the risk of forfeiture as long as it broadcasts its indecent material during the safe harbor of the evening and early morning hours. The merchants in Rhode Island had no similar respite. This court will not construe the FCC forfeiture scheme as a system of censorship when that system only operates for two-thirds of the broadcasting day.

These distinctions demonstrate that the schemes at issue in *Bantam Books* and this case are not the same.[14] The court cannot, based on *Bantam Books*, construe the FCC's forfeiture scheme as one of prior restraint and censorship. The FCC is enforcing a court-approved definition of indecency through a system that provides for notice and judicial review. This is not the prior review and censorship of broadcast material. This is the FCC's regulation of an industry that serves at the pleasure of the public interest. Plaintiff may feel a chill because of the FCC's forfeiture scheme, but that chill is temporal only and has not been unconstitutionally inflicted. Accordingly, the court grants the FCC's motion for summary judgment on Infinity's constitutional claim and denies Infinity's motion for summary judgment.[15]

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, the court concludes that it has jurisdiction only over the constitutional claim asserted, that only Infinity Broadcasting Corporation has standing

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[14] The court recognizes that *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C.Cir.1975) questioned whether the FCC forfeiture scheme could be unconstitutional under *Bantam Books*. 515 F.2d at 403. That question was raised in dicta however, and did not address the distinctions this court has drawn.

[15] Because the court concludes that the FCC forfeiture scheme does not constitute a system of prior restraint and censorship this court need not address plaintiffs' due process argument.

to bring that claim, that the constitutional claim is ripe only as to Infinity, and that the FCC's forfeiture scheme does not violate the First Amendment. An appropriate Order shall issue this date.

ORDER AND JUDGMENT

This case comes before the court on plaintiffs' motion for a preliminary injunction, and plaintiffs' and defendant's cross-motions for summary judgment. For the reasons stated in the accompanying Memorandum Opinion issued this date it is hereby ORDERED that:

1. The court GRANTS the FCC's motion to dismiss count III of plaintiffs' Complaint for lack of subject matter jurisdiction.

2. The court GRANTS the FCC's motion to dismiss the following plaintiffs for lack of standing: Action for Children's Television; the American Civil Liberties Union; the Association of Independent Television Stations, Inc.; EZ Communications, Inc.; Fox Broadcasting Company, Inc.; Fox Television Stations, Inc.; the Motion Picture Association of America, Inc.; the National Association of Broadcasters; the National Association of College Broadcasters; National Public Radio; People for the American Way; Post- Newsweek Stations, Inc.; the Public Broadcasting Service; the Radio- Television News Directors Association; Shamrock Broadcasting, Inc.; the Society of Professional Journalists; 20 South Fork Broadcasting Corporation; and 20th Century Fox Film Corporation.

3. The court GRANTS the FCC's motion to dismiss plaintiff Greater Media, Inc. because Greater Media's claim is not yet ripe.

4. The court GRANTS the FCC's motion to dismiss plaintiff Evergreen Media Corporation based on considerations of comity.

5. The court DENIES the FCC's motion to dismiss plaintiff Infinity Broadcasting Corporation's constitutional claim arising from the 1990 Notice of Apparent Liability.

6. The court GRANTS the FCC's motion for summary judgment on counts I and II of plaintiff's complaint and ENTERS summary judgment for the FCC on those counts, which are hereby DISMISSED WITH PREJUDICE.

7. The court DENIES plaintiffs' motion for summary judgment in its entirety and DENIES plaintiffs' motion for a preliminary injunction as moot. This case now stands DISMISSED.

SO ORDERED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

47 U.S.C. § 503. Forfeitures

* * * *

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order

issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

(2)(A) If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act described in paragraph (1) of this subsection.

(B) If the violator is a common carrier subject to the provisions of this chapter or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act described in paragraph (1) of this subsection.

(C) In any case not covered in subparagraph (A) or (B), the amount of any forfeiture penalty determined under this subsection shall not exceed $10,000 for each violation or each day of a

continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act or failure to act described in paragraph (1) of this subsection.

(D) The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, who no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the filed office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title, or in

the case of violations of section 303(q) of this title, if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) of this title from the Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred—

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) prior to the date of commencement of the current term of such license,

whichever is earlier; or

(B) such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

For purposes of this paragraph, "date of commencement of the current term of such license" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) of this title pending decision on an application for renewal of the license.

47 U.S.C. § 504. Forfeitures

(a) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided,* That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo: *Provided further,* That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties provided in this chapter. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

Supreme Court, U.S.
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No. 95-620

In the Supreme Court of the United States

OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the statutes governing the enforcement of the federal limitations on the broadcast of indecent programming are unconstitutional, either on their face or as generally applied by the Federal Communications Commission.

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OCTOBER TERM, 1995

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FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 59 F.3d 1249. The opinion of the district court (Pet. App. 31a-62a) is reported at 827 F. Supp. 4.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. The petition for a writ of certiorari was filed on October 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a constitutional challenge to the procedures by which the Federal Communications Commission (FCC or Commission) enforces the limitations governing the broadcast of indecent programming.

1. Section 503(b) of the Communications Act of 1934, 47 U.S.C. 503(b) (1988 & Supp. V 1993), authorizes the FCC to impose a monetary forfeiture for violations of various statutory provisions, including 18 U.S.C. 1464, which generally prohibits the broadcast of "obscene, indecent, or profane language." 47 U.S.C. 503(b)(1)(D) (Supp. V 1993). See generally *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978).[1]

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[1] The substantive contours of the government's power to regulate indecent broadcast programming, which are not at issue in this case (Pet. App. 3a), have been the subject of a lengthy separate litigation. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (remanding FCC's decision to restrict indecent programming to hours after midnight); *Action for Children's Television* v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992) (invalidating 24 hour-a-day ban on such programming). In Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 954, codified at 47 U.S.C. 303 note (Supp. V 1993), Congress instructed the FCC to promulgate regulations generally prohibiting indecent broadcasting between the hours of "6 a.m. and 12 midnight." In *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), petitions for cert., Nos. 95-509 (filed Sept. 26, 1995) & 95-520 (filed Sept. 28, 1995), that statute and the FCC's regulations were invalidated to the extent they prohibited indecent broadcast programming between 10 p.m. and midnight.

The FCC generally initiates broadcast indecency forfeiture proceedings after receiving an indecency complaint from a listener or viewer that is accompanied by a tape or transcript of significant excerpts of the offending programming, as well as information identifying the station and the date and time of the broadcast. Pet. App. 4a; C.A. App. 41-42 (Stipulation of Fact No. 9). If a complaint contains the required information, it is examined by the Commission's staff to determine whether the matter warrants further investigation. If not, the complaint is dismissed. If the complaint is not dismissed, a "Letter of Inquiry" (LOI) often is sent requesting further information from the broadcaster named in the complaint. Pet. App. 33a.

After further consideration, if the Commission's staff determines that such action is warranted, a "Notice of Apparent Liability" (NAL) is issued. The NAL sets forth the facts underlying the agency's claim that the relevant law or regulations were violated, and gives the person an opportunity (generally 30 days) to submit materials in its defense. 47 U.S.C. 503(b)(4); 47 C.F.R. 1.80(f)(3).[2] The Com-

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[2] Under 47 U.S.C. 504(c),

> [i]n any case where the Commission issues a [NAL] looking toward the imposition of a forfeiture * * *, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

Petitioners originally asserted that the FCC violates that provision in administering the broadcast indecency scheme. The courts below refused to entertain that statutory claim on the ground that it was within the FCC's primary jurisdiction,

mission or its Mass Media Bureau then reviews the broadcaster's response (if any) to the NAL, and determines whether a forfeiture is warranted. Pet. App. 34a.[3]

In determining the amount of any forfeiture, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. 503(b)(2)(D) (Supp. V 1993). In no event may a forfeiture penalty exceed $25,000 for each violation, or each day of a continuing violation. 47 U.S.C. 503(b)(2)(A) (Supp. V 1993). A forfeiture for a continuing violation arising out of a single act or omission may not exceed $250,000 in total. *Ibid.*

A forfeiture penalty is due and payable once it has been imposed by the Commission. Any person may refuse to pay the penalty, however, and force the FCC to refer the matter to the U.S. Attorney's Office for collection in a trial *de novo* in federal district court. 47 U.S.C. 504(a).

2. This case was commenced by various broadcasters and broadcast organizations, joined by several organizations representing listeners and viewers, who sued in federal district court to challenge the

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see Pet. App. 9a-12a, 43a-45a, and petitioners have abandoned it in this Court. See Pet. 10 n.11.

[3] The statute also authorizes the FCC, in its discretion, to impose a forfeiture after holding a formal administrative hearing, with review of the agency's decision in the court of appeals under the Administrative Procedure Act. 47 U.S.C. 503(b)(3). Although it reserves the right to do so, 47 C.F.R. 1.80(g), the FCC currently does not use that procedure to impose a forfeiture for broadcast indecency. Pet. App. 3a.

lawfulness of the procedures by which the FCC enforces the prohibitions against broadcast indecency. Petitioners contended that the regulatory scheme as administered by the FCC unconstitutionally restrains their expression. The parties filed motions for summary judgment on a stipulated record, and the district court granted judgment for the government.

After rejecting the contention that petitioners' constitutional claims fell within the exclusive jurisdiction of the court of appeals, Pet. App. 41a-43a, the district court held that the claims of only petitioner Infinity Broadcasting Corporation (Infinity) were properly before it. Pet. App. 45a-52a. Relying on controlling circuit precedent, the court found that the organizations representing listeners and viewers lacked standing to assert their challenge to the FCC's indecency forfeiture proceedings. Pet. App. 45a-46a. The court came to the same conclusion regarding the broadcast petitioners that had never been involved in a forfeiture proceeding, reasoning that they could not show that they had suffered any injury from the challenged procedures. Pet. App. 47a-48a. The court also dismissed on ripeness grounds the claims of those broadcasters who had not had final forfeiture orders entered against them, observing that the FCC might decide not to impose a forfeiture. Pet. App. 50a-51a. Finally, the court dismissed the claims of petitioner Evergreen Media on grounds of comity, explaining that Evergreen was challenging the forfeiture order entered against it in a lawsuit pending in another district. Pet. App. 52a.

On the merits, the district court upheld the constitutionality of the broadcast indecency forfeiture procedures. Distinguishing the actions of the Rhode Island commission condemned by this Court in

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963), the court found that the FCC is not engaged in "the prior review and censorship of broadcast material," but is instead enforcing a "court-approved definition of indecency through a system that provides for notice and judicial review." Pet. App. 59a.

3. The court of appeals affirmed. It agreed with the district court that petitioner Infinity had standing and that its claims were ripe for adjudication. Pet. App. 12a-14a. The court also agreed that the FCC is "not operating a scheme of informal censorship like the one held unconstitutional in Bantam Books." Pet. App. 14a.

The court of appeals rejected petitioners' facial challenge to the forfeiture provisions, finding that the provisions are "clearly capable of constitutional application." Pet. App. 16a. As the court explained, "nothing in the statutes or regulations prevents the Commission from issuing a NAL, imposing a forfeiture, and if need be referring a case to the Department of Justice all within a period of time short enough virtually to eliminate any concern with delay." Pet. App. 15a (suggesting that "[t]he whole course could probably be run in most cases within, say, 90 days").

The court also upheld the constitutionality of the broadcast indecency regulation scheme as generally applied by the Commission. As the court observed, "the Commission is not administering anything akin to a literal prior restraint." Pet. App. 18a. "Broadcasters are free to air what they want; if and only if what they air turns out to transgress established guidelines do they face a penalty—but that is very much after the fact, not prior thereto." *Ibid.*

In addition, the court observed, the regulatory scheme did not constitute a "prior restraint in effect," since it would not "cause[] a speaker of reasonable fortitude to censor itself in order to conform with an unconstitutional standard." Pet. App. 18a. Among other things, the court emphasized, it had no evidence that the FCC "is * * * enforcing the statutory ban on indecency against material that is not indecent," or that it "has done anything actively to discourage judicial review of any indecency forfeiture it imposed," or that it "has failed or will fail to follow judicial guidelines for determining what is indecent and what is not." Pet. App. 18a-19a.

Finally, the court pointed to "[t]wo avenues of relief" open to any broadcaster concerned about excessive delay in the administration of the broadcast indecency scheme. Pet. App. 21a. First, the court observed, a broadcaster could "stipulate [to] the facts giving rise to the Notice of Apparent Liability and state that it will not pay the forfeiture unless ordered to do so in district court." *Ibid.* That would allow the FCC to refer the matter immediately to the Justice Department, thereby expediting the broadcaster's opportunity for a judicial trial on the merits. *Ibid.* In the alternative, the court suggested, a broadcaster "suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding" could file an action seeking a declaratory judgment that the material in question is not indecent, and in that manner "dispel any unwarranted chilling effect." Pet. App. 22a.[4]

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[4] *Chief Judge Edwards, concurring,* emphasized that petitioners had "failed to show that speech that is not indecent is in fact being chilled." Pet. App. 24a. Judge Tatel dissented.

ARGUMENT

The court below held that it had jurisdiction over the claims of only one petitioner—Infinity. In September of this year, however, Infinity executed a settlement agreement with the government that disposed of all of the pending indecency forfeiture actions against it. By reason of that settlement, Infinity no longer has a concrete stake in the outcome of the claims it asserts in this case. Because the petition for certiorari does not seek to review the district court's dismissal of the claims asserted by any of the other petitioners for lack of standing or ripeness, and because Infinity is no longer subject to any indecency proceedings, the petition should be denied.

The decision below is also the first by any court of appeals to address the constitutionality of the procedures by which the FCC enforces the statutory limitations against the broadcast of indecent programmi :g. Because the decision does not conflict with that of any other court and correctly disposes of the issues presented by this case, further review is not warranted.

1. As petitioners acknowledge (Pet. 7), on September 1, 1995, Infinity entered into a comprehensive settlement agreement with the FCC and the Department of Justice that disposed of all pending indecency forfeiture matters against it.

Pursuant to that agreement, the FCC vacated the pending forfeiture order and NALs that had been issued against Infinity, and ordered its Mass Media

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In his view, the case should have been remanded to the district court "to establish procedures to facilitate prompt judicial review of forfeiture determinations." Pet. App. 30a.

Bureau to dismiss "as to Infinity * * * all pending complaints that either involve programming aired or originated by Infinity." *Sagittarius Broadcasting Corp.*, FCC No. 95-386, 1995 WL 521389 (Sept. 1, 1995), at 2. The FCC also agreed to treat the forfeiture, the NALs and the pending complaints "as null, void, and expunged from Infinity's record for all purposes, including, but not limited to, any future qualifications issue, future licensing proceeding or future transfer of control or assignment of license or permit involving Infinity." *Id.* at 4. By reason of the settlement and the disposition of all pending indecency enforcement actions against it, Infinity is no longer suffering any concrete, imminent injury resulting from the FCC's enforcement of the broadcast indecency limitations. This Court therefore lacks jurisdiction to review its claim that the enforcement procedures are unconstitutional. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Petitioners briefly assert in a footnote in their statement of the case that the district court's dismissal of the constitutional claims of petitioners other than Infinity was "improper[]." Pet. 10 n.11. But nowhere in their questions presented (or elsewhere in the petition, for that matter) do petitioners raise the issues of standing, ripeness, and comity relied upon by the district court to dismiss those claims. See Pet. i, 12-22. Petitioners have thus failed to preserve those issues for review by this Court. Sup. Ct. R. 14.1(a); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645 (1992).

In sum, Infinity has comprehensively settled the FCC's case against it, thus placing its standing and the ripeness of its claim in no different posture than

those of the other broadcast petitioners. In this Court, petitioners do not challenge the district court's disposition of the other petitioners' claims on standing, ripeness, and comity grounds. Since that disposition provides an independent and unchallenged basis for affirmance of the judgment below, petitioners are in no position to secure review by this Court of the claims they press in their petition.

2. Moreover, petitioners do not claim that there is any conflict among the circuits on the issues disposed of by the decision below. On the contrary, the court of appeals was the first to address the constitutionality of the FCC's broadcast indecency forfeiture scheme. Other broadcasters remain free to attempt to persuade another court of appeals that, despite the decision below, the Commission's enforcement of the broadcast indecency limitations is constitutionally defective. In addition, an individual broadcaster can also raise the same issues as part of its defense to a suit to collect an indecency forfeiture. See *United States* v. *Evergreen Media Corp.*, 832 F. Supp. 1179, 1183 (N.D. Ill. 1993). Unless and until a circuit conflict arises on the issues presented by this case, review by this Court would not be warranted even if the proffered issues were properly before this Court.[5]

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[5] There is no reason to hold this petition pending the disposition of *Pacifica Foundation* v. *FCC*, petition for cert., No. 95-509 (filed Sept. 26, 1995), and *Action for Children's Television* v. *FCC*, petition for cert., No. 95-520 (filed Sept. 28, 1995). Those cases involve the substance of the government's power to regulate indecent broadcast programming, not the procedures by which indecency restrictions are enforced. Nor should the petition in this case be held for disposition in light of *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, cert. granted, No. 95-124 (Nov. 13, 1995), and *Alliance for Community Media, Inc.* v. *FCC*, cert. granted, No. 95-227 (Nov. 13, 1995). Those cases involve the government's substantive power to regulate indecent programming under the entirely different regulatory scheme governing cable television; they too do not involve the procedures by which the regulations are enforced.

3. There is no merit in any event to petitioners' claims that the broadcast indecency enforcement scheme constitutes a system of "informal censorship" or a prior restraint. Pet. 14. By statute, a broadcaster subject to an FCC indecency enforcement proceeding has the unrestricted right to a trial "de novo" in federal district court before it can be required to pay any forfeiture penalty. 47 U.S.C. 504(a). If the district court does not agree with the FCC's indecency determination, the broadcaster cannot be compelled to pay the forfeiture. There is thus no enforceable obligation to pay an FCC broadcast indecency forfeiture order until a district court has determined, after a trial, that the Commission's indecency determination is correct.

Petitioners assert that they nonetheless "attempt to conform their conduct to the indecency standards articulated by the FCC and its Commissioners, whether or not they believe those standards are constitutional." Pet. 12 n.15 (emphasis omitted). Because it is ordinarily assumed that persons will attempt to conform their conduct to federal law, as announced and enforced by the appropriate authorities, petitioners' voluntary efforts to do so do not convert the FCC's actions into a censorship scheme. As this Court has recognized, deterrence of unlawful conduct, even in the area of the First Amendment, is a "legitimate end" of government. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60

(1989); *Alexander* v. *United States*, 113 S. Ct. 2766, 2774 (1993). In this case, the court of appeals found, there is no basis on which to conclude that "the FCC is * * * enforcing the statutory ban on indecency against material that is not indecent." Pet. App. 18a. If petitioners disagree, however, they have only to refuse to pay any particular forfeiture and force the Commission to shoulder its burden of convincing a court that the material at issue is in fact indecent.

Because the FCC's forfeiture orders are not self-executing, petitioners err in asserting (Pet. 14-15) that the court of appeals' decision conflicts with a number of cases in which this Court has emphasized the need for prompt judicial review of prior restraints, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975); *Freedman* v. *Maryland*, 380 U.S. 51, 60 (1965), or similar schemes under which government action to suppress speech took effect *before* the target of the action had the opportunity for judicial review, *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 801-802 (1988) (professional fundraisers had "to await a determination regarding their license application before engaging in solicitation"); *Blount* v. *Rizzi*, 400 U.S. 410, 418-419 (1971) (once administrative order is entered, orders for magazines may be returned to senders and money orders may not be paid to publishers of magazines). Those cases provide no support for petitioners' contention that prompt judicial review is similarly essential where the governmental action takes effect only *after* judicial review occurs.

4. Petitioners err in asserting (Pet. 13-19) that the decision of the court of appeals conflicts with this Court's decision in *Bantam Books, Inc.* v. *Sullivan*,

372 U.S. 58 (1963). In *Bantam Books*, the Rhode Island Commission to Encourage Morality in Youth notified book distributors that certain publications had been found "to be objectionable for sale, distribution or display to youths under 18 years of age," *id.* at 61, and that the Commission had a "duty to recommend" criminal prosecution of purveyors of obscenity, *id.* at 62. The Rhode Island Commission also circulated copies of the list of objectionable items to local police departments, and local police typically visited distributors to follow up on the Commission's notice. *Id.* at 62-63. Those tactics had the effect of causing distributors to withdraw their materials from circulation while at the same time discouraging them from contesting the Commission's actions in court. *Id.* at 63-64. As this Court found, the Commission had "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67.

As the court of appeals explained, "[t]he lesson of *Bantam Books*" is that the government "may not move to suppress speech by means of a scheme that, as a practical matter, forecloses the speaker from obtaining a judicial determination of whether the targeted speech is unprotected, lest [it] be able effectively to suppress protected speech." Pet. App. 17a. No such obstacles to judicial review obtain in this case. As the court of appeals emphasized, there is simply "no indication" that the FCC has done anything "actively to discourage judicial review of any indecency forfeiture it imposed." Pet. App. 19a.[6]

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[6] That few indecency cases have come before the district courts does not suggest that review is being obstructed, since the dearth of such cases may be "the effect of any of several

Petitioners complain (Pet. 13) that they face delays in obtaining judicial review.[7] But since a broadcaster is not under an enforceable obligation to pay a forfeiture penalty until a district court has found in the Commission's favor, any delay in obtaining judicial review does not, by itself, unduly burden petitioners' speech. In any event, as the court of appeals noted (Pet. App. 21a-22a), broadcasters have available ways of expediting the enforcement process—including stipulating to the facts or announcing an intention not to pay—that can serve to minimize any delay.[8]

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inoffensive causes: the Commission has only recently stepped up its enforcement efforts; the violators penalized thus far may very well have broadcast the indecency as charged and thus see no point in contesting the forfeiture in court; and broadcasters may be self-censoring only indecent material, eliminating the need for many prosecutions." Pet. App. 19a.

[7] In addition to civil proceedings initiated by the FCC, a broadcaster may be the subject of a criminal prosecution for broadcasting obscene or indecent material in violation of 18 U.S.C. 1464. Under the limitations period generally applicable to federal criminal proceedings, an indictment can be brought up to five years after the date of the offense. See 18 U.S.C. 3282. That is approximately in the middle of the two- to seven-year period that a broadcaster can expect to wait before appearing in court to contest an FCC forfeiture. See Pet. App. 5a-6a. Under petitioner's theory, therefore, an "undoubtedly constitutional," Pet. App. 16a, criminal prosecution that is brought within the statutory limitations period would have to be dismissed as in violation of the First Amendment.

[8] In stark contrast, Infinity affirmatively took steps to delay judicial review after the FCC imposed a forfeiture of $6,000 on Infinity in October 1992. See *Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873 (1992). Infinity petitioned the agency for reconsideration of the forfeiture order. The Commission denied Infinity's petition for reconsideration

Petitioners also allude to the fact that individual FCC Commissioners have on occasion made public statements exhorting broadcasters to adhere to the Commission's indecency determinations. Pet. 5-6. As petitioners are aware, however, statements by individual Commissioners do not constitute actions by the Commission itself. *Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975). Moreover, none of those statements does more than emphasize that individual Commissioners take seriously the Commission's indecency enforcement responsibilities. It is not improper for the Commissioners, who are public officials, to discuss their views as to Commission policies. Indeed, as this Court emphasized in *Bantam Books*, it has never suggested "that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws [regulating speech] * * * [w]here such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them." 372 U.S. at 71-72.

There are a number of other reasons why the claims of informal censorship in this case are "not nearly as compelling" as those asserted in *Bantam Books*. Pet App. 21a. For example, in *Bantam Books*, a particular concern was that the informal and unreviewable actions taken by the Rhode Island Commission to Encourage Morality in Youth were backed up with the threat of society's most severe punishment—a prosecution for violation of a criminal statute. See 372 U.S. at 68 ("People do not lightly

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in May 1993. See *Sagittarius Broadcasting Corp.*, 8 F.C.C.R. 3600 (1993).

disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."). In this case, the FCC's actions are reviewed *de novo* in a civil proceeding to collect the amount of the forfeiture—a proceeding that is not likely to have a similar effect on broadcasters, who have generally been able in the past to represent their interests forcefully in court when they choose to do so. Moreover, this case, unlike *Bantam Books*, involves the regulation of broadcasting, which has historically received "the most limited First Amendment protection." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978); see *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2456 (1994). Broadcasters also receive notice and an opportunity to be heard before the FCC makes any final determination of indecency. Compare 372 U.S. at 71. Lastly, while a bookseller seeking to avoid a dispute with the Rhode Island Commission had to cease selling the disputed books to anyone—child or adult—a broadcaster wishing to avoid a dispute with the FCC "need only move its arguably indecent material to a different time of day, not refrain from broadcasting it altogether." Pet. App. 21a. See generally *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), petitions for cert., Nos. 95-509 & 95-520.

In the end, petitioners' claims would effectively preclude the Commission from developing and elaborating upon "Congress's declared policy of banning indecency from the air-waves during certain hours of the day." Pet. App. 19a. There is nothing inherently unconstitutional about administrative enforcement of otherwise lawful government regulation of speech. In this case, moreover, the Commission's

expertise and policy judgment are especially well-suited to resolution of the factual and contextual issues that underlie indecency determinations. *FCC* v. *Pacifica Found.*, 438 U.S. at 742, 750; see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 130 (1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONERS

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On Petition for a Writ of Certiorari to the
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REPLY FOR PETITIONERS

1. The FCC's brief in opposition is most significant for what it leaves undisputed. *First*, the FCC does not dispute the exceptional importance of the question whether its scheme of indecency regulation is constitutional. As the FCC itself urged four years ago, the constitutionality of broadcast indecency restrictions "warrants this Court's attention" because it is "an issue of concern to virtually every American household." Petition for Certiorari at 21, *FCC v. Action for Children's Television*, No. 91-952 (Dec. 16, 1991). Since 1987, the FCC has issued at least 47 NALs for allegedly indecent broadcasting. Pet. 9 & n.10. The FCC also has announced plans to issue over 100 more, apparently depending on the outcome of current litigation. *See In the Matter of Sagittarius Broadcasting Corp.*, 1995 FCC LEXIS 5924, at *4 (Sept. 5, 1995) (Statement of Chairman Hundt).

Second, the FCC does not attempt to defend the grounds of decision asserted by the court of appeals: that a system of

"informal censorship" within the meaning of *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), is facially constitutional as long as no statute "prevents" prompt judicial review (Pet. App. 15a-16a) and that plaintiffs raising procedural challenges under *Bantam Books* must prove that the speech at issue is substantively protected (Pet. App. 18a-19a). As explained in the petition for certiorari (Pet. 14-17), those holdings squarely conflict with numerous decisions of this Court.

Third, the FCC does not dispute that its enforcement scheme, as a practical matter, has completely foreclosed judicial review of individual indecency forfeitures. Pet. App. 5a.[1] The FCC concedes that the process of administrative adjudication and judicial review consumes between two and seven years, although it could occur within less than 90 days, and that no indecency forfeiture has been reviewed on the merits. Opp. 6, 14 n.7.[2] The FCC also does not dispute that it uses indecency forfeitures to instruct broadcasters how to program their stations and that it threatens them with substantial and escalating penalties unless they comply immediately. Pet. App. 6a, 38a-39a.

Finally, although every judge on the panel below expressed

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[1] As explained in the petition for certiorari (Pet. 8-9), the only circumstances where review has been available are in cases where the FCC has imposed general indecency restrictions by regulation or in extremely rare cases where the FCC has rendered an adjudicatory determination of indecency, but has declined to impose a forfeiture. Neither context affords any opportunity to obtain review of the dozens of indecency determinations rendered in the context of forfeiture orders. Thus, as a practical matter, the FCC's individual enforcement decisions escape review entirely.

[2] The one case cited by the FCC, *United States v. Evergreen Media Corp.*, 832 F. Supp. 1179 (N.D. Ill. 1993), is the only collection action brought by the government since 1987. That case was settled over 18 months after it was filed, and over 6.5 years after the allegedly indecent broadcast at issue, without any judicial determination of the constitutional defenses raised by the broadcaster. *See* Pet. 4-5.

doubts about whether the indecency forfeiture scheme is constitutional,[3] the FCC does not suggest that its current enforcement policies are likely to change. On the contrary, the FCC remarkably argues that its aggressive interim enforcement, without judicial review, is justified because "deterrence of unlawful conduct, even in the area of the First Amendment, is a 'legitimate end' of government." Opp. 11. Moreover, the FCC attempts to place responsibility for the extraordinary delays in judicial review on broadcasters who will not "expedit[e] the enforcement process" by "stipulating to the facts" alleged by the FCC. Opp. 14.[4]

2. Despite these significant concessions, the FCC nonetheless opposes review in this Court. The FCC contends (Opp. 8-9) that there is no case or controversy because petitioner Infinity Broadcasting Corporation recently settled all of its pending cases and because the district court dismissed the other petitioners from the case. The FCC argues that because there are no longer "pending" enforcement proceedings, Infinity "is no longer suffering any concrete, imminent injury resulting from the FCC's enforcement of the broadcast indecency limitations." Opp. 9.

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[3] *E.g.*, Pet. App. 2a, 16a (majority twice characterizing scheme as constitutionally "troubling"); Pet. App. 22a, 24a (concurrence "with reservations" noting "serious problems with the current practice followed by the FCC"); Pet. App. 29a-30a (dissent concluding that FCC's "manipulation of speech without judicial review is unconstitutional").

[4] The FCC suggests that Infinity "affirmatively took steps to delay judicial review" (Opp. 14 n.8) by filing a prompt petition for reconsideration one month after an adverse FCC forfeiture order. *See* Stipulations of Fact, Ex. 3, at 1A, *Action for Children's Television v. FCC*, No. 93-0400 (D.D.C. Mar. 24, 1993) (hereafter "Stipulations"). The FCC took six months to adjudicate the petition. *See id.*; Opp. 14 n.8. In that same case, the FCC took 22 months to issue an NAL (from the date of the complaint), and an additional 23 months to issue the forfeiture. *See* Stipulations, *supra*, Ex. 3, at 1 to 1A.

The FCC cites no case for the proposition that there cannot be a case or controversy absent pending enforcement proceedings. This Court routinely has upheld the standing of plaintiffs to seek prospective relief against *future* enforcement, despite the absence of pending proceedings. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968). A requirement of pending proceedings would entail the absurd consequence that federal courts could never afford prospective relief against enforcement by the states, because the existence of pending state proceedings triggers a duty to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. *See, e.g., Trainor v. Hernandez*, 431 U.S. 434, 441-46 (1977). On that view, this Court could not have even decided *Bantam Books*.

A plaintiff may seek prospective relief to prevent future injuries that are neither "conjectural" nor "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[5] The FCC has promised continued aggressive enforcement both in its official decisions and in the stipulated record filed in this case. *See, e.g.*, Stipulations, *supra* note 4, at 17; *Notice of Apparent Liability to Infinity Broadcasting Corp.*, 8 FCC Rcd 6740, 6741 (1993). Infinity alone has been the subject of five enforcement proceedings where the forfeitures totalled over $1.7 million. Pet. 6-7. The FCC's activity clearly establishes a case or controversy as to future enforcement.

Throughout this litigation, broadcasters including Infinity have claimed standing not only because of pending proceedings, but

[5] The injury must be traceable to the defendant and redressable by a favorable decision on the merits. *See Defenders of Wildlife*, 504 U.S. at 561. The FCC does not dispute that these requirements are satisfied here.

also because of a credible threat of future enforcement.[6] As a prevailing party with respect to standing, Infinity could not have sought review to challenge the reasoning of the courts below on that point. *See, e.g., Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939). At a minimum, Infinity may continue to assert the possibility of future enforcement as a proper, and properly preserved, ground for standing in this Court. *See, e.g., Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.19 (1979).[7]

3. The absence of a conflict among the circuits does not argue against review.

a. As noted above, the FCC does not dispute the exceptional importance of the question presented. This Court has granted review in the past, despite the absence of a circuit conflict, to consider important questions about the scope of the FCC's power to regulate indecent broadcasting. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Denver Area Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 471 (1995) (granting certiorari).

b. This case presents an ideal vehicle for resolving the question. The nineteen petitioners in this case include not only

[6] *See, e.g.*, Complaint, *Action for Children's Television v. FCC*, No. 93-0400, at 25 (D.D.C. Feb. 24, 1993) (hereafter "Complaint") (requesting court to "order the dismissal of all indecency forfeiture proceedings . . . currently pending" *and* to "enjoin the FCC from initiating or conducting [indecency] forfeiture proceedings"); Brief of Appellants, *Action for Children's Television v. FCC*, No. 93-5178, at 42-44 (D.C. Cir. May 18, 1994) (argument titled "All Broadcasting Plaintiffs Have Alleged Sufficient Article III Injury").

[7] As long as Infinity has standing to litigate the question presented, the standing of the other petitioners is immaterial. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977). The court of appeals recognized this point: after concluding that Infinity has standing, it addressed petitioners' claims on the merits without determining whether the district court had properly dismissed the other petitioners. Pet. App. 12a-14a.

individual broadcasters but also broad-based organizations, such as the National Association of Broadcasters, that represent virtually every interest affected by the FCC indecency enforcement scheme.[8] The record contains a series of stipulations exhaustively chronicling FCC enforcement activities since 1987. Both courts below filed published opinions engaging the constitutional question at some length. And, as noted above, the FCC has made clear that it has no intention of tempering its enforcement activities.

c. Deferring review would significantly harm the First Amendment interests at issue. While the FCC suggests that other broadcasters might "persuade another court of appeals" in the future (Opp. 10), such litigation is unlikely to be commenced because most of the affected parties are already represented here, and new litigation, even if not barred by *res judicata*, would consume several more years. The FCC's alternative suggestion that broadcasters raise constitutional challenges as a defense in enforcement proceedings (Opp. 10) simply urges that they submit to the very scheme they contend is unconstitutional. It also ignores the practical impossibility of obtaining such review.

d. While the court of appeals' specific holding might not directly conflict with the holdings of other circuits, its narrow reading of *Bantam Books* is in considerable tension with various other appellate decisions. *See, e.g., United States v. P.H.E., Inc.*, 965 F.2d 848, 855-56 (10th Cir. 1992) (applying *Bantam Books* to invalidate multiple prosecutions for distribution of

[8] Petitioners include six broadcasters; two program distributors; eight organizations representing broadcasters, distributors and journalists; and three organizations representing listeners and viewers. *See* Complaint, *supra* note 6, at 3-10. While the FCC presently asserts (and we agree) that broadcasters may raise *Bantam Books* challenges in future cases (Opp. 10), the FCC might resist those challenges by seeking to invoke traditional preclusion doctrines. *Cf.* Restatement (Second) of Judgments § 41(1) (1982) (person "represented by a party" is sometimes bound by judgment).

allegedly obscene material); *Planned Parenthood Federation v. Agency for Int'l Development*, 915 F.2d 59, 64 (2d Cir. 1990) (*Bantam Books* applies to "censorship by means of intimidation"), *cert. denied*, 500 U.S. 952 (1991); *Cruz v. Ferre*, 755 F.2d 1415, 1422 (11th Cir. 1985) (applying *Bantam Books* to invalidate municipality's indecency forfeiture scheme). Review is appropriate to address this "conflict in principle." *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975).

4. On the merits, the FCC contends primarily that its indecency forfeiture scheme does not constitute a system of "informal censorship" because its orders "are not self-executing," but "tak[e] effect only *after* judicial review occurs." Opp. 12. The FCC completely fails to distinguish the scheme at issue in *Bantam Books*, where the censoring authority could impose no "self-executing" sanction at all, but could merely refer the targeted speakers to the state attorney general for prosecution. *See* 372 U.S. at 66. Nonetheless, as the court of appeals recognized, this Court held that the scheme constituted an impermissible system of "informal censorship" because it had an immediate effect and foreclosed judicial review "as a *practical* matter." Pet. App. 17a (emphasis added).[9]

5. Finally, the FCC contends that petitioners' claims, if successful, "would effectively preclude the Commission" from

[9] While the FCC notes that statements by FCC Commissioners "do not constitute actions by the Commission itself" (Opp. 15), it does not dispute that this Court considered comparable statements in assessing the practical effect of the enforcement scheme at issue in *Bantam Books*. *See, e.g.*, 372 U.S. at 67. Contrary to the FCC's suggestion (Opp. 15-16), this Court frequently has applied the procedural principles of *Bantam Books* in cases involving primarily civil enforcement. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975); *Blount v. Rizzi*, 400 U.S. 410, 411-12 (1971). The FCC also repeats the various purported distinctions of *Bantam Books* relied upon by the district court and not addressed by the court of appeals. Opp. 16. As explained in the petition for certiorari (Pet. 18-19), those distinctions are insubstantial.

enforcing indecency restrictions. Opp. 16. In fact, however, the claims would impose no substantive restrictions on the permissible scope of indecency regulation, but would simply require an affirmative guarantee of prompt judicial review of FCC indecency determinations. The First Amendment demands no less.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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